In The Supreme Court of The United States,

October Term, 1904.

No. 618.

Josiah Millard, Appellant,

vs.

Ellis H. Roberts, Treasurer of the United States; Henry B. F. MacFarland, Henry L. West, and John Biddle, Commissioners of the District of Columbia; The Philadelphia, Baltimore and Washington Railroad Company; The Baltimore and Ohio Railroad Company; and The Washington Terminal Company.

Appeal from the Court of Appeals of the District of Columbia.

BRIEF AND ARGUMENT OF APPELLANT.

I. STATEMENT OF THE CASE.

This is an appeal from a decree rendered by the Court of Appeals of the District of Columbia on the 21st of March, 1905, affirming the decree of the Supreme Court of the District of Columbia, in Equity No. 24131, dismissing at complainant's costs his original and amended bills of complaint therein.

The averments of the bill and amended bill are in substance: That the complainant is a citizen of the District of Columbia; that he is obliged to pay, and does pay, direct taxes on lands owned by him in said District; that the revenues of the District are chiefly derived from such direct taxes; that the three Acts of Congress complained of, all of which are designated by their titles and dates, provide for the assessment and collection of direct taxes, on private property in said District, and are "revenue bills" within the meaning of Article 1, Section 7, Clause 1, of the Constitution of the United States. That every one of said Acts originated in the Senate, and is void by reason of the prohibition of such acts by said Constitutional provision. That the direct taxes imposed by the said Acts are not apportioned among the several States in proportion to population, as Article 1, Section 9, Clause 4, and Article 1, Section 2, of the Constitution require, and are also void for that reason. Section 6 of the bill of complaint is as follows:

1st. "That the District of Columbia owns no stock in any of the defendant companies; nor is otherwise interested in any of them save as useful private enterprises; yet that by the terms of the said act (of Feb. 28, 1903) in section eight of the same, construed in connection with section nine of an act relating to the Baltimore and Potomac Railroad Company, approved February 12, 1901, which is continued in force except as modified thereby, the said District is required without any lawful consideration therefor, to pay to the defendant, The Philadelphia, Baltimore and Washington Railroad Company, the sum of seven hundred and fifty thousand dollars, "to be levied and assessed upon the taxable property and privileges in the said District other than the property of the United States and the District of Columbia, for the exclusive use of said corporation, which is a private use, and not a public governmental use.

2d. "That by the terms of the said act of February 28, 1903, contained also in section eight thereof, construed in con-

nection with section eight of an act relating to the Baltimore and Ohio Railroad Company, approved February 12, 1901, which is continued in force except as modified thereby, the said District is likewise required, without any just or lawful consideration therefor, to pay to the defendant, The Baltimore and Ohio Railroad Company, the sum of seven hundred and fifty thousand dollars "out of the revenues of the District of Columbia," for the exclusive use of the said defendant, which is a private use, and not a public governmental use."

Section 15 of the amended bill of complaint avers that the Act of Congress entitled "An Act for eliminating certain grade crossings on the line of the Baltimore and Potomac Railroad Company in the city of Washington, D. C., and requiring said company to depress and elevate its ttracks, and to enable it to relocate parts of its railroad therein, and for other purposes," approved February 12, 1901; and the Act of Congress entitled "An Act to provide for eliminating certain grade crossings of railroads in the District of Columbia, to require and authorize the construction of new terminals and tracks for the Baltimore and Ohio Railroad Company in the city of Washington, and for other purposes," approved February 12, 1901; an also the Act of Congress entitled "An Act to provide for a union railroad station in the District of Columbia, and for other purposes," approved February 28, 1903, are the acts referred to in section 6 of the original bill of complaint herein; and that each and every one of said acts originated in the Senate of the United States, and not in the House of Representatives, as the Constitution requires in the case of such bills. The same section of the amended bill of complaint also refers, in support of these allegations, to the following entries in the official "History of Bills and Joint Resolutions—Senate Bills," found in the Congressional Record, volumes 33, 34, 35 and 36:

"S. 1929.

"To provide for eliminating certain grade crossings on the line of the Baltimore and Potomac Railroad Company, in

the city of Washington, D. C., and requiring said company to depress and elevate its tracks, and to enable it to relocate parts of its railroad therein, and for other purposes.

"Introduced by Mr. McMillan and referred to Committee on District of Columbia 600. Reported back with amendments (S. Report 928) 3962.—Debated and amended 4409, 4412, 5544, 6088.—Passed Senate 6093.—Referred to House Committee on District of Columbia 6179."—Congressional Record, Vol. 33, Bill Index, p. 59.

"Reported back with amendments (H. R. Report, 2026), 330, 348.—Debated and amended, 392, 395, 396, 407 427 437. —Passed House 454, 455.—Referred to House Committee on District of Columbia 6179."—Congressional Record, Vol. 33, Bill Index, p. 59.

"Reported back with amendments (H. R. Report 2026), 330, 348.—Debated and amended 392, 395, 396 , 407; 437.— Passed House 454, 455.—Referred to Senate Committee on District of Columbia with House amendments 466.—Reported back and Senate disagrees to House amendments 1288.— House insists on its amendments 1316.—Conference appointed 1288, 1317.—Conference report made and agreed to 1838, 2104.—Examined and signed 2180, 2184.—Approved by President 2293." Bill Index, p. 5. Congressional Record, Vol 34. "S. 2329.

"To provide for eliminating certain grade crossings of railroads in the District of Columbia, to require and authorize the construction of new terminals and tracks for the Baltimore and Ohio Railroad Company in the city of Washington, and for other purposes.

"Introduced by Mr. McMillan and referred to Committee on District of Columbia 762.—Reported back with amendments (S. Report 1303), 5476.—Debated and passed Senate 6093.—Referred to House Committee on District of Columbia 6179." Congressional Record, Vol. 33, Bill Index, 6 71.

"Reported back with amendments (H. R. Report 2036) 385.—Debated and amended 445, 452.—Passed House 455.—

Referred to Senate Committee on District of Columbia with House amendments 466.—Reported back and Senate disagrees to House amendments 1288.—House insists on its amendments 1317.—Conference appointed 1288, 1317.—Conference report made and agreed to 1838, 2103.—Examined and signed 2180, 2184.—Approved by President 2293."—Congressional Record, Vol. 34, Bill Index p. 7.

"S. 4825—

"To provide for a union railroad station in the District of Columbia, and for other purposes.

"Mr. McMillan: Committee on District of Columbia 3448.—Reported back with amendments (S. Report 982) 3593.—Passed over in Senate 4352, 4426.—Debated 4513, 4562, 4608, 4609, 5305, 5356, 5425.—Amended and passed Senate 5469.—Referred to House Committee on District of Columbia 5588."—Congressional Record, Vol. 35, Bill Index p. 134.

"Reported back with amendment (H. R. Report 2788) 171. —Debated, amended, and passed House 322, 324, 331.—Senate disagrees to House amendments 365.—House insists on its amendments 424.—Conference appointed 365, 424.—Conference appointed 365, 424.—Conference report made and agreed to 1374, 1967, 1989.—Senate further disagrees to House amendments 1989.—House insists on its amendments 1971.—Second conference appointed 1971, 1989.—Conference report made and agreed to 2715, 2648.—Examined and signed 2730, 2756.—Approved by President 2779."—Congressional Record, Vol. 36, Bill Index p. 14.

Those parts of these acts which are assailed in this proceeding will be fully set out in the argument further on.

The relief sought herein is threefold; being, primarily, that the statutes in question be declared null and void for want of authority in Congress to pass them in the mode pursued and adopted in their passage; and, incidentally, that the Commissioners of the District of Columbia, the Treasurer of the United States, and the defendant corporations be enjoined

and strictly forbidden from carrying into effect, or attempting to carry into effect, any of the said Acts, or any part thereof; and that the Treasurer be enjoined from paying over to any person any money under, or by virtue of, any claim that may be made in pursuance of any provision of any of the said Acts of Congress.

Official copies of all three of the Acts in controversy were filed with the bill as exhibits, and made, by reference, parts thereof; and there were sufficient averments to establish the jurisdiction of the Court, sitting as a Court of Equity.

Separate demurrers were filed by the several defendants, the same being directed as well to the amended, as to the original bill of complaint; and on July 2, 1904, Justice Anderson, of the Supreme Court of the District of Columbia, sustained the demurrers, and dismissed the bills. From his decree an appeal was taken by the complainant to the Court of Appeals of the District of Columbia; which Court, on March 21, 1905, affirmed the decree of the lower Court. An appeal from the last mentioned decree was prayed and allowed to this Court.

The opinions of both the lower Courts are set out in the record.

For complete copies of the acts assailed, and previous acts relating to the said railroad companies, as well as reports of the Commissioners of the District of Columbia, of committees of the two houses of Congress, and also of officers of the War Department relating to the subject, the Court is referred to Senate Document, No. 220, 57th Congress, 2d session, which is herewith filed.

II. ASSIGNMENTS OF ERROR.

The Court of Appeals of the District of Columbia erred in the following particulars:

1. It wholly disregarded the two legal principles:

(a) That an evasion of the Constitution is a violation of it; and

(b) That no presumption can arise to defeat the constitutional inhibition against the passage, by Congress, of an Act authorizing or imposing taxes on the property of the people, unless such Act originated in the House of Representatives.

2. It failed to give due consideration to the points made in the 11th and 12th sections of my bill of complaint (Transcript of the Record, p. 4) respecting the deprivation of property without due process of law.

3. It treated the Acts of Congress aforesaid as valid and binding contracts between the Government and the said companies, in respect, as well to the mode of their enactment, as to the political subdivision and the property on which the sums of money therein mentioned were to be levied, assessed, and paid; disregarding entirely the maxims of taxation, as the same had been laid down by this Court in numerous cases, as well as the Constitution itself.

4. It gave undue weight to the claims of the defendant corporations concerning alleged "grants," and ignored the fact that no grant or other assurance of title to any land in the District of Columbia, had been made to any of said corporations, either by Congress or by the District Government, prior to those contained in the said Acts of February 12, 1901; and that those grants were manifestly obtained by means of false representations, made to Congress in the interest of the defendant corporations, and with the evident design of laying, stealthily, a foundation for future claims, which Congress might be induced to allow on the principle declared by this Court in the case of U. S. v. Realty Company, 163 U. S., at page 444, respecting the "debts of the United States."

5. It wholly ignored, and, in effect, denied, the very existence of the said Act of February 12, 1901, relating to the Baltimore and Potomac Railroad Company.

6. It failed to consider the said Act of February 28, 1903, so far forth as it relates directly to, and is inseparable from, the status of the Philadelphia, Baltimore and Washington

Railroad Company as the successor of the said Baltimore and Potomac Railroad Company.

7. It erroneously pronounced the purpose of this suit to be "to prevent the payment by the Treasurer (of the United States) out of the funds of the District of Columbia of the sum of $1,500,000 to the Baltimore and Ohio Railroad Company, and an equal sum to the Philadelphia, Baltimore and Washington Railroad Company, as the share of the District in carrying these Acts (meaning only the Union Station Act and the Baltimore and Ohio Act) into effect;" thus widely missing the mark. (Record, p. 29.)

8. It eliminated entirely from its view of the case the fact that in 1901, Congress, without any lawful consideration except the promise of the Baltimore and Potomac Railroad Company "to convey its passenger-station building to the United States," agreed, by a bill originating in the Senate, to pay one-half the costs and expenses of relocating and improving that corporation's railroad line in the District of Columbia, and saddled this District with $125,000 of those costs and expenses, to "be levied and assessed upon the property and privileges" therein, and, moreover, deprived it of the right to receive for the use of its public schools the taxes which the Baltimore and Potomac Railroad Company had been obliged to pay on the property occupied by it on the Mall, which property was valued a $1,275,000; thus destroying the endowment of its schools to that extent, which unconstitutional and void agreement aforesaid, constitutes the pretended consideration for the gift of $1,500,000 to the Philadelphia, Washington and Baltimore Railroad Company by the said Act of February 28, 1903; citing it (Record, p. 29) as "the Act of Congress of February, 1901, 31 Stat., 774, for the elimination of grade crossings of railroads in this District," (Record p. 29); and failing to mention or consider the other Act of the same date relating to the Baltimore and Potomac Company, 31 Stat., 767; thus creating a false implication in the statement of the case;

and it nowhere corrects this false implication, but reasons from it, throughout, as if it were true.

11. It held, in effect (Record, p. 30), that the relinquishment, by the Baltimore and Ohio Railroad Company, of its rights under a grant made by Congress to the corporation in 1850, and extended in 1867, of "permission to use steam engines in propelling cars on its Washington Branch, east of the east line of New Jersey Avenue," until 1910 (S. Doc. 220, pp. 32, 33, 63), constituted a valid and sufficient consideration for the extraordinary grants of propertty and money made to it by the act relating to the same company in 1901, and confirmed to it by the Union Station Act of 1903, the Constitution notwithstanding.

12. It conceded "that the acts in question originated in the Senate" (Record, p. 30); and that "the money appropriated is, or is to be, the result of taxation" (Record, p. 31); but erroneously infers from these premises that "no question of taxation is involved here" (Record, p. 31); and that "the acts in question are not bills for raising revenue, but at the utmost bills for the expenditure of revenue or appropriation bills, where the appropriation is incidental to some other purpose." (Record, p. 30.)

13. It held that "the question in this case is simply as to the use of the money after it had been raised" (Record, p. 31). thus wholly ignoring the 7th and 8th sections of my bill of complaint (Record, p. 3), which are as follows:

"7. That the public moneys of the District of Columbia are raised chiefly by direct taxation on the lands therein, and that the complainant is obliged to pay, and does pay, direct taxes on lands owned by him therein.

"8. That the principle of apportionment established in the Constitution secures the District from any oppressive exercise by Congress of the power to lay and collect direct taxes therein for any but the public governmental purposes of the said District"—

and, by ignoring these two vital points, making it appear that I am merely raising a moot question, instead of defending my plain right to the equal protection of the law in the matter of direct taxation.

14. It held that "there is not here any appropriation of money to a private use" (Record, p. 31); thereby implying that an appropriation to a railroad company for the improvement and relocation of its line of railroad and the building of a new and magnificent depot, to be owned by such company, is for a public use, and one which will support taxation, both local and general.

15. It failed to draw any distinction between the public governmental uses of the District of Columbia and those of the United States; thus again ignoring a material point raised by my complaint.

16. It failed to exercise its proper functions as a Court of Chancery for the protection of the charitable use which was established by the Act of May 21, 1872, in favor of the public schools of this District in the property on the Mall occupied by the Baltimore and Potomac Railroad Company, and which the acts complained of were designed to defeat by means of provisions contrary to public policy.

17. It failed to reverse the decree of the Supreme Court of the District of Columbia, which denied to me the enjoyment of a Constitutional right.

III. POINTS AND AUTHORITIES.

1. Taxes on land or the profits issuing from lands are taxes in the strict sense of the word: they are direct taxes within the meaning of the Constitutional provision respecting the apportionment of representatives and direct taxes, and, therefore, also necessarily within the meaning of the provision that all bills for raising revenue shall originate in the House of Representatives.

Pollock v. Farmers' Loan and Trust Co., 157 U. S., 429; 158 U. S. 601.

Story on Constitution, section 880 and note.

Bank v. Nebeker, 3 App. D. C., 190, 198-201.

Same case, 167 U. S., 196, 203.

Cooley on Taxation (3rd ed.) 95, 96 and notes.

License Tax Cases, 5 Wall., 462.

Binns v. U. S. 182, U. S. 292.

Downs v. Bidwell, 194 U. S., 489, 496.

New York Franchise Tax Case, decided May 29, 1905, by this Court.

2. The chief characteristic of an act which lays a tax for any purpose whatever, is, that it is intended to raise revenue by taxation; and no other purpose, pretended or real, can deprive it of the nature of a bill for raising revenue. Bills which lay taxes on lands or incomes for any purpose whatever are "bills for raising revenue within the purview of the Constitution."

Story Const., Sec. 880, and note.

Income Tax Cases, 157 U. S., 429.

Cong. Record, Feb. 16, 1905 (Payne's citations).

3. It does not matter that this legislation relates to the District of Columbia, even if it related exclusively to it; for notwithstanding any rule of either House, the power of Congress in this District is restricted and qualified by all the general limitations, express or implied, which are imposed on its authority by the Constitution.

Curry v. D. C., 14 D. C., App., 429, 438-445.

Callan v. Wilson, 127 U. S., 127.

Thompson v. Utah, 170 U. S., 343-346.

U. S. More, 3 Cranch, 160, note.

Loan Associations v. Topeka, 20 Wall, 655.

Loughborough v. Blake, 5 Wheaton, 317, 325.

Wilkes County v. Coler, 180 U. S., 506, 513-525.

Cohens v. Va., 6 Wheaton, 264, 446.

4. If a tax is imposed upon one of the political subdivi-

sions of a country, as in the present case, the purpose must not only be a public purpose as regards the people of that subdivision, but it must also be local.

People v. Town of Salem, 20 Mich., 452, 474.

Cohens v. Va., 6 Wheaton, 264, 446.

Loughborough v. Blake, 5 Wheaton, 317, 325.

5. The people of the District of Columbia cannot be taxed to pay "the debts of the United States," in whole or in part, whether equitable or legal, unless the taxes on them for that purpose be, if indirect, uniform throughout the United States, and be, if direct, apportioned among the States and Territories in proportion to population; and hence the case of United States v. Realty Co., 163 U. S., 440, 444, the Sugar Bounty Case, is no precedent here, even if these taxes were designed to pay a debt, and not to provide uno flatu a bounty for a private corporation and a stately edifice for the adornment of the capital of the nation, as such. The cases above cited sustain this contention.

6. The right of taxation can only be used in aid of a public object, an object which is within the purpose for which governments are established, and cannot, therefore, be exercised in aid of enterprises strictly private, even though, in a remote or collateral way, the local public may be benefited thereby.

Loan Association v. Topeka, 20 Wall., 655, 664.

Cole v. LaGrange, 112 U. S., 1, 6.

Miles Planting Co., v. Carlisle, 5 D. C. App. 138.

Hanson v. Vernon, 27 Iowa, 28.

Whiting v. Sheboygan Fond du Las R. R. Co., 25 Wis., 167.

Sweet v. Hulbert, 51 Barb. (N. Y.), 312.

Lowell v. Boston, 111 Mass. 454, 457-661, 472, 473.

Central Branch U. P. R. R. Co. v. Smith, 23 Kansas, 533.

See also Record, page 30 (2).

7. The Act of Congress of May 21, 1872, "designating a depot site for the Baltimore and Potomac Railroad" on the

Mall, also created a trust fund for the use of the public schools of the District of Columbia (S. Doc. 220, p. 85), by a contract to which the Baltimore and Potomac Railroad Company and the Board of Aldermen and Common Council of this District were parties, and to which the United States became a party by said act, which charitable use could not be defeated by the acts of Congress herein complained of, but is still a subsisting estate with regard to which this Court should establish a constructive trust by making the Philadelphia, Baltimore and Washington Railroad Company a trustee, to the use of said schools, of the moneys it may receive from the United States in consideration of any rights which it pretends to have acquired in the property on the Mall in derogation of the rights of said schools.

Hill on Trustees, 116.

Story's Eq. Jur., section 1167, et seq.

Mormon Church Case, 136 U. S., 1, 2, 36, 59.

Town of Paulett v. Clark, 9 Cranch, 292.

Am. and Eng. Encyc. of Law.

8. It is admitted by the Court of Appeals that all three of the acts in question originated in the Senate (Record, p. 30); and the same fact also appears affirmatively by reference to the Congressional Record, as stated in the 15th section of the amended bill of complaint herein, and also by reference to the Journal of the Senate, 1st session, 56th Congress, pp. 57, 75, 399, and 1st session, 57th Congress, pp. 279, 409, 410; and to Senate Reports, 928 and 1303, 56th Congress, 1st session, and Senate Report 982, 57th Congress, 1st session; as well as from the numerous reports of the committees of the two houses of Congress, the Commissioners of the District of Columbia, and the officers of the U. S. Engineer Department, printed in Senateate Document, No. 220, 57th Congress, 2d session, herewith filed.

9. A literal compliance with the mandatory proisions of the Constitution, whether affirmative or negative, is a condition precedent to the validity of any law laying taxes on the

property of the people, and attempts to evade those provisions constitute violations of them.

Wilkes County v. Coler, 180 U. S., 506, 521, 522.

Baltimore v. Gill, 31 Md., 375, 387, 388.

Rodman v. Munson, 13 Barb. (N. Y.) 63.

People v. Nicoll, 3 Selden, 9 to 139.

10. All remedial laws, such as the constitutional provisions respecting taxation and due process of law, must be so construed as to repel the mischief and advance the remedy, by searching out and nullifying evasions as well as violations of them.

Atty-Gen. v. Meyricke, 2 Vesey, Sr., 44.

Atty-Gen. v. Day, 1 Vesey, Sr., 218.

Atty-Gen. v. Davies, 9 Vesey, Jr,. 535, 541.

Marbury v. Madison, 1 Cranch, 137, 175-6.

Ex parte Garland, 4 Wall., 333.

Cummings v. Missouri, 4 Wall., 237.

Baltimore v. Gill, 31 Md., 375.

Cooke County v. Industrial School for Girls, 125 Ill., 540, 564-5.

Farmer v. St. Pau, 67 N. W. Rep., 990.

Washingtonian Home v. Chicago, 157 Ill., 414, 428.

Central Transportation Co., v. Pullman's Palace Car Co, 139 U. S., 24, 40, et seq.

Loan Association v. Topeka, 20 Wall., 655.

Ward v. Joplin, 186 U. S., 142, 152.

Brownsville v. League, 129 U. S., 493.

Loan Association v. Topeka, 20 Wall., 655.

Bank of San Francisco v. Dodge, Assessor, U. S. Sup. Ct., No. 44, Oct. term, 1904.

11. No conclusive presumption can arise to defeat the operation of the mandatory and remedial provisions of the Constitution respecting taxation and due process of law, which are self-executing.

Wilkes County v. Coler, 180 U. S., 506, 521-522.

Post v. Supervisors, 105 U. S., 657, 667.

Town of South Ottawa v. Perkins, 94 U. S., 260, 263.

IV. ARGUMENT.

These acts present a complicated scheme of legislation in which there lurks an ill-concealed design to evade the mandatory requirements of the Constitution of the United States and the fundamental maxims of the law of taxation and of charitable uses, for the double purpose of aggrandizing the capital of the United States and of promoting the interests of certain influential corporations at the expense of the taxpayers of the District of Columbia. No one can read the three acts in question, or their history, without feeling that all the parties responsible for them must have been fully sensible of the obstacles which the Constitution and the accepted principles of taxation interposed in the way of such legislation, and that the very terms and phraseology employed in them were carefully chosen for the purpose of evading the restrictions imposed by the Constitution upon the enactment of any such law. The very titles of the acts are themselves misleading. Those of the two acts of 1901 speak only of the elimination of grade crossings, as denoting their primary object; while that of 1903 speaks only of providing a union railroad station—both of which purposes are perfectly proper and constitutional subjects of legislation, provided only that the Constitution and the inherent conditions of taxation be complied with. But it is not the thing professed to be done, but that which is actually done, or sought to be done, which must determine the question of the power of Congress to pass these acts; and in considering them we must not for a moment forget that we are dealing with substance, and not with mere form.

These acts have been held by the lower courts to be police regulations and contracts, and to be valid as such. But whether they are valid contracts or valid police regulations depends, not upon the recitals in their titles or the pretenses injected into their various provisions, but upon the true con-

struction, operation and effect of the whole scheme—upon upon the scope and drift of the entire system.

In dealing with this subject, I shall divide it for convenience under four heads:

1st. The Act of February 12, 1901, relating to the Baltimore and Potomac Railroad Company.

2d. Those parts of the Act of February 28, 1903, which relate to the same company and to the Philadelphia, Baltimore and Washington Railroad Company, as its successor.

3d. The Act of February 12, 1901, relating to the Baltimore and Ohio Railroad Company.

4th. Those parts of the Act of February 28, 1903, which relate to that Company.

I. THE ACT OF CONGRESS OF FEBRUARY 12, 1901, RELATING TO THE BALTIMORE AND POTOMAC RAILROAD COMPANY.

In respect to this act I wish to call particular attention to section 9, relating to the "division of costs;" to section 14, relating to "taxation;" to section 3, relating to "the station building;" and to section 16, repealing by implication the Act of May 21, 1872.

And in connection with these provisions, I invite attention also to the Act of May 21, 1872, "designating a depot site for the Baltimore and Potomac Railroad" on the Mall; which provides that "the said property, so occupied by said company, together with the improvements which may be put thereon, shall be subject to tax by the District of Columbia, and to be used exclusively for the support of public schools in said District." (17 Stat. 140; S. Doc., No. 220, p. 85).

Section 16 of the Act of February 12, 1901, provvides "that all laws and parts of laws inconsistent herewith be, and they are hereby repealed" (S. Doc. No. 220, p. 135).

Now, the following extracts from the Act of 1901 disclose a clear incompatibility between that act and the Act of 1872; so that the latter was repealed by the former, if the former is valid. The result of this repeal, and the grant of

the property on the Mall to the railroad company, will hereafter be shown to be totally inconsistent with sound public policy, and especially in violation of the law of charitable uses.

Section 9 of the Act of 1901 provides as follows:

"DIVISION OF COSTS."

"Sec. 9. That the entire cost and expenses of the revision, changes, relocations, and improvements of and in said railroad, as authorized and required by the preceding sections of this Act, and of all structures connected therewith or incidental thereto, shall be borne, paid, and defrayed in manner following, to wit: The said Baltimore and Potomac Railroad Company shall bear, pay, and defray all cost and expense of the relocations, elevation, and depression of its tracks within the limits of its right of way as are authorized and required by this Act, including the construction of so much of the bridges conveying streets over its tracks, right of way, and other property as shall be within the limits thereof, and the reconstruction within such limits of the streets which shall be carried beneath the same, the cost and expense of removing its tracks from Sixth street north of Virginia avenue, and from K street and Canal street, and the restoration of such parts of said streets for the uses of the public, and the cost and expense of constructing and maintaining the arch or arches for passageways underneath its said tracks located on the Mall, as well as the original cost of paving the roadways and sidewalks to be located within the said passageways. All other costs, expenses, and damages resulting from, incidental to, or connected with the revisions, changes, and improvements in alignment and grades of said railroad, or the relocations thereof by this Act required and authorized, and from changes in the grades of the streets or the railroad, and the lawful operation of the said railroad upon the location and structures contemplated and required by this Act, and whether to property owners affected thereby or otherwise, as well as the cost

and expense of of all street approaches to said company's tracks and right of way, whether overhead by means of bridges or under grade, shall be borne, paid, and defrayed in manner following, to wit: Fifty per centum thereof by the United States and the remaining fifty per centum thereof by the District of Columbia, which last mentioned fifty per centum shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia."

This provision is not a contract of bargain and sale, as it has been called; for it is not an agreement to buy or to sell anything; it fixes no particular price on anything; it designates no particular party to whom any payment shall be made. Nor is it an appropriation of money. If it were such it would expressly "appropriate" a specific sum out of any moneys of the United States which were actually in the Treasury at the time of its passage, and which were "not otherwise appropriated;" or else it would "appropriate" moneys out of the revenues of the District of Columbia already collected by taxation or otherwise, without specifying that they should be hereafter collected by means of taxation exclusively. The word word appropriate is absent. Nothing is appropriated. The money mentioned could not be drawn from the Treasury unless it were appropriated by law. (Const. Art. 1, sec. 9, cl. 7).

This, then, is merely a covenant for a "division of costs," to be incurred and paid after the passage of the act by reason of "the revisions, changes, relocations, and improvements in alignment and grades of railroad," contemplated by the act. And it is also a covenant that a portion of those costs, which, according to a report of the Commissioners (S. Doc. 220, p. 191), would amount to $125,000, shall be "levied and assessed upon the taxable property and privileges in said District, other than the property of the United States or of the District of Columbia," excluding all other revenues and even money on hand. It is a covenant creating an obligation, not

merely to pay money, but to levy and assess taxes on taxable property; that is, to levy direct taxes, and to apply the proceeds exclusively to the extinguishment of the obligation to be incurred for the improvements mentioned. In substance, it is a covenant originating in the Senate, to do an unconstitutional act, and is vitiated by ts inherent immorality. It is clearly against public policy. It originated in the Senate, not as an amendment to a House bill, but as an integral part of a Senate bill. I submit that it is an attempt to evade the constitutional provisions which declare that "all bills for raising revenue shall originate in the House of Representatives;" that "representatives and direct taxes shall be apportioned among the States in proportion to numbers;" that "no capitation or other direct tax shall be laid, unless in proportion to the census;" that "no money shall be drawn from the Treasury, but in pursuance of appropriations made by law;" that "no person shall be deprived of his property without due process of law;; and that "private property shall not be taken for public use without just compensation"—all of which are remedial laws, to evade which is to violate them.

The provisions of the organic law of the land inhere as conditions in the power of Congress to impose any tax whatever, or to create any burden for which such taxation is to provide. They cannot be evaded by means of any contract, treaty, or other form of agreement.

Baltimore v. Gill, 31 Md., 375, 387.

The People v. Nicoll, 3 Selden, 9 to 139.

Rodman v. Munson, 13 Barb. (N. Y.), 63.

In these three cases provisions creating so-called contractual obligations by way of statutes and ordinances, precisely similar in their operation and effect to those contained in this act, were declared void as attempts to evade constitutional restrictions.

By section 14 of this act it is provided as follows:

"TAXATION."

"Sec. 14. That the property occupied by the Baltimore and Potomac Railroad Company under authority of this Act, together with the improvements which may be put thereon, shall be subject to tax by the District of Columbia: Provided, that no assessment, valuation, or tax shall be made, laid, or levied on the Baltimore and Potomac Railroad Company on account of any bridges, tunnels, elevated tracks, or subway which shall be located, constructed, or maintained under the authority of this Act, and forming part of said railroad, in excess of that which would or could be lawfully made, laid, or levied if such railroad was wholly located and constructed on the surface of the ground; it being the true intent and meaning hereof that any such bridges, tunnels, elevated tracks, or subway forming a part of said railroad shall be assessed and valued for purposes of taxation and taxed on the same basis as any other equal portion of railroad situated within the said District of Columbia not constructed on, in, through, or upon any such bridges, tunnels, elevated tracks, or subway."

Right here I submit two propositions of law:

1st. That every bill reducing or repealing taxes, or exempting particular property from taxation, is a revenue bill within the meaning of the Sonstituttion; and

2d. That every bill providing that revenue shall be collected on particular property, though at a less rate than that fixed by existing law upon other property, is a bill for raising revenue.

The first proposition applies to the second clause of the foregoing section; and the second proposition applies to the first clause thereof. These two propositions are based upon the note at the end of section 880 of Story's work on the Constitution, which note relates to the tariff legislation of 1872; and they are also fully sustained by the numerous instances of similar resolutions in both Senate and House of Representatives, cited by Mr. Payne in support of his resolution defending the prerogative of the House on February 16, 1905,

and especially by the Stevens resolution of June 30, 1864, which will be discussed under the next head, but to which special attention is called in this connection.

In April, 1872, the House of Representatives passed a bill "to repeal existing duties on tea and coffee." The Senate substituted for it a bill containing a general revision, reduction, and repeal of laws imposing import duties and internal taxes, and sent the substituted bill to the House for concurrence. This raised the question whether "a bill reducing or repealing taxes was a bill for raising revenue within the meaning of the Constitution;" and, if so, whether the action of the Senate was not an assault upon the prerogative of the House. Mr. Dawes of Massachusetts, offered a resolution declaring that it was "in conflict with the true intent and purpose of that clause of the Constitution which requires that all bills for raising revenue shall originate in the House of Representatives." Messrs. Dawes, Garfield, Butler, and other leaders spoke earnestly in favor of its adoption. Mr. Garfield declared that the Senate had "usurped a right of the House, which could not be invaded without inflicting a fatal wound upon the integrity of our whole system of government."

The resolution prevailed by a vote of 152 yeas against 9 nays.—(Congressional Globe, 42d Cong., 2d session, pages 2105-2111.)

The Senate thereupon referred the subject to its committee on Privileges and Elections, who reported that "while the Senate might have amended the House bill so as to abolish duties altogether upon other articles, the Senate had no right to ingraft upon it, as it did in substance, an amendment providing that revenue should be collected upon other articles, though at a less rate than previously fixed by law; because that amendment would have become a provision, in the act, for raising revenue; since revenue at a certain rate, would have been collected by the operation of the act." (Congressional Globe, 42d Cong., 2d session, p. 5112.) Story Const., Sec. 880, Note.

Section 14 of this act then provides both for taxation and for exemption from taxation. The railroad company relied upon the exemption to increase the value of its property; and the provision not only did that, but it shifted to the shoulders of the people of this District the burden of supplying the deficiency of revenue arising from such exemption.

Section 3 of the same act contains the following:

"STATION BUILDING.

" Sec. 3. That in order to accommodate the increasing passenger, mail, express, and other traffic in the city of Washington the said Baltimore and Potomac Railroad Company shall have and be possessed of the right, which is hereby granted and conferred, to occupy and use, on the conditions hereinafter mentioned, that portion of the Mall lying between B street southwest and B street northwest as the southerly line of said B street northwest is hereinafter defined, and between the west line of Sixth street and a line drawn parallel therewith and three hundred and forty feet west thereof, and to erect and maintain thereon a station building and appurtenances, train sheds, and tracks and sidings in connection therewith suitable and adequate for the convenient accommodation of said traffic, etc."

In order to understand the full effect of the foregoing provision and of those of the subsequent Act of February 28, 1903, modifying and confirming them, it is necessary to bear in mind the act under which the Baltimore and Potomac Railroad was allowed to enter upon the Mall in the beginning, entitled "An Act to confirm the action of the Board of Aldermen and Common Council of the City of Washington, designating a depot site for the Baltimore and Potomac Railroad Company, and for other purposes," approved May 21, 1872, which provides that "the Baltimore and Potomac Railroad Company shall have the right to extend its track from Virginia avenue along Sixth street to the open grounds between Sixth street and B street north and the canal, described as follows: Be-

ginning at the southwest corner of Sixth street and B street north, running west one hundred and fifty feet along B street; thence south eight hundred and two feet to the present line of the canal; thence east one hundred and fifty feet to the line of Sixth street; thence north by line of Sixth street to the place of beginning; and the said company shall, so far as the United States can so provide, have the right to hold, use, and occupy the said grounds for the purpose of constructing thereon a passenger depot, to be used by the said company for passenger and express-freight traffic, and for no other purposes; and the said property so occupied by said company, together with the improvements which may be put thereon, shall be subject to tax by the District of Columbia the same as other property in the District of Columbia, and to be used exclusively for the support of the public schools in said district." (17 Stat. 140). S. Doc. 220, p. 85.

The Act of May 21, 1872, was, in effect, an endowment of the public schools of the District of Columbia—the establishment of the public school fund for the District of Columbia—the establishment of a public charitable use in the property occupied by the railroad company on the Mall. It was made at a time when Congress was granting public lands to the several States of the Union for educational purposes. It was a patriotic and noble use; and was to continue as long as the railroad company should occupy the land described in the act. It vested in the city of Washington, May 21, 1872, and in the District of Columbia as the successor of that corporation in 1878. In 1901 it constituted an asset valued at $1,275,000. (S. Doc. No. 220, p. 253). It was a vested equitable estate worth that amount of money to the tax-payers of this District. The representatives of the railroad company and the Commissioners of the District agreed that it was worth that sum. As trustees of that estate, the Commissioners were disqualified from diverting it, or any part of the proceeds of it, to any but educational purposes, because the law of charitable uses was directly applicable to its administration.

If the Act of 1901 was a contract, so was that of 1872; and by the latter act "the said property, so occupied by said company, together with the improvements put thereon," was made "subject to tax by the District of Columbia," and the proceeds of that tax were "to be used exclusively for the support of the public schools in said District."

Congress was bound by this contract. The railroad company was bound by it. The District Government was bound by it. It was a contract creating an estate which could not be defeated except by the voluntary withdrawal of the railroad from the Mall, or by an Act of Congress compelling its removal therefrom. Any modification of that contract which might defeat that estate by releasing the taxes to the railroad company, and allowing it still to occupy the property, must necessarily be mala fides, and also void as against public policy, and especially against that great branch of the law of public policy known as the la wof charitable uses. This act of 1901 was against public policy, not only because it amounted to a bounty to a private corporation, as I shall show hereafter, but because it amounted to converting a public eleemosynary foundation into a private use. Schools and the means of education are always to be encouraged. But the Act of 1901 discouraged and robbed them in order to establish an odious private monopoly and perpetuity.

Now, I call the Court's attention on this point to the 6th and 7th propositions laid down in the syllabus of its opinion in the Mormon Church Case (136, 215, 1, 2), which, if applied in this case, would abrogate the Act of of 1901, and reinstate the District in its rights under the Act of of 1872:

"By the law of charitable uses, when the particular use designed is unlawful and contrary to public policy, the charity property is subject to be applied and directed to lawful objects most nearly corresponding to its original destination; and will not be returned to the donors or their heirs or representatives,

"The Court of Chancery in the exercise of its ordinary powers over trusts and charities may appoint new trustees on

failure or discharge of former trustees, and may compel the application of charity funds to their appointed uses, if lawful; and by the sovereign power of the State, if not by its own inherent power may reform the uses when illegal or against public policy, by directing the property to be applied to legal uses conformable as near as possible to the use originally declared."

See also in same case the remarks of Justice Bradley, pp. 148-162. Also Story's Equ. Jur. Sections 1167 et seq. Town of Pawlet v. Clark, 9 Cranch, 292.

Property given to a charity becomes in a measure public property, applicable, as far as may be, to the specific purposes to which it is devoted; and within these limits, it is consecrated to the public use and is a part of the public resources for promoting the happiness and well-being of the people of the State. The legislature may interpose only to make such disposition of the matter as will accord with the purposes of justice and right. This is a part of the law of charitable uses. Now, I submit that the Acts of 1901 and 1903, whereby this District was robbed of an equitable estate worth $1,275,000, which had been devoted to a legitimate charitable use by the Act of 1872, did not accord with justice and right; and that they are void for that reason.

But aside from this, if there were nothing else in the Act of 1901, except the 14th section, no one could deny that it did lay taxes, or at least authorize taxation; and by reason of authorizing and laying taxes it became, ipso facto, a revenue bill quoad the taxes thus authorized or laid. It is admitted by the Court of Appeals that the money raised under it was, or was to be, the result of taxation; and that it originated in the Senate. Here, then, we certainly have two conditions of a void act of Congress: 1st, that it authorizes taxation in the strict sense of the word; and 2d, that it originated in the Senate.

If the Act of 1901 is void, the Union Station Act of 1903 is necessarily void so far forth as it is based upon it or is in

confirmation of it. For it is a well settled principle of law, known as the doctrine of ultra vires, that an act or deed which is void ab initio cannot be made valid by confirmation or ratification. Nor can any act of ratification or confirmation derive any validity or force from a previous act which was itself ultra vires of the party making it.

II. THOSE PARTS OF THE ACT OF FEBRUARY 28, 1903, WHICH RELATE TO THE BALTIMORE AND POTOMAC RAILROAD COMPANY, AND TO THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, AS ITS SUCCESSOR.

The provisions of this act to which particular attention is sought are those parts of section 8, relating to the "removal of tracks from the Mall," the "payment to the railroad," and "laws continued in force;" the second and fourth clauses of section 5, relating to the laying out of a "plaza," the opening of new streets and "damages;" and the whole of section 6, relating to "taxation."

Section 8 contains the following provisions:

(1) "Within five years from the passage of this Act the said Philadelphia, Baltimore and Washington Railroad Company shall be, and it is hereby, required to remove its present eastern connection between its passenger station and its line on Virginia avenue via Sixth street, including the tracks on Sixth street, and its western connection via Maryland avenue, and to convey its passenger station building to the United States.

(2) "And in consideration thereof, and of the relinquishment and surrender by said Philadelphia, Baltimore and

Washington Railroad Company of its right to occupy and use the portion of the Mall, and to maintain thereon a new passenger station and terminals, granted to the Baltimore and Potomac Railroad Company by the Act aforesaid in consideration of and as a contribution toward the large expenditures to be made by said company in the relocation and improvement of its line of railroad and elimination of grade crossings resulting therefrom, as required by said Act, the sum of one million five hundred thousand dollars shall be paid to said Philadelphia, Baltimore and Washington Railroad Company, its successors and assigns, out of any moneys in the Treasury of the United States not otherwise appropriated, and said sum of one million five hundred thousand dollars is hereby expressly appropriated for this purpose, and shall be paid upon presentation of a certificate by the Commissioners of the District of Columbia that said passenger station and terminal and connecting lines of railroad contemplated by this Act are ready for occupancy.

(3) "Except as modified by this Act, all provisions for said Act relating to the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, and all rights, powers, remedies, and processes thereby conferred on said last-named company, or upon the Southern Railway Company, shall remain and continue in full force, and with like effect as if herein re-enacted at length; and all rights, powers, and privileges granted to, or duties imposed upon, said Philadelphia, Baltimore and Washington Railroad Company by this Act shall accrue to and devolve upon its successors and assigns, as provided with respect to the Baltimore and Potomac Railroad Company by section fifteen of said Act relating to said Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, and all provisions of said section shall be applicable thereto in all respects."

The 2d and 3d clauses of this paragraph relate to the 3d, 14th, and 16th sections of the Act of 1901, whereby the Act of

1872 was repealed and the company given the right to occupy and use the property on the Mall exclusively for its own benefit, and the improvements thereon exempted from taxation, in wanton disregard of the solemn compact of 1872, by which that property was consecrated to the use of the public schools of this District.

The 2d clause makes an odd kind of appropriation "to be paid out of any moneys in the Treasury of the United States" upon the happening of a future event; and, as if doubtful of the effect of such a newfangled form of appropriation, patches it by adding that the sum mentioned "is hereby expressly appropriated." Now, I submit that this is only a covenant to pay upon a contingency, and that it is not an appropriation in the true sense of that word; that it is not from any legal point of view such an appropriation as is contemplated by that clause of the Constitution which provides that "no money shall be drawn from the Treasury, but in pursuance of appropriations made by law."

An appropriation is the application of a sum of money by a debtor to one or more of several debts due from the debtor to a creditor. But here there was no debt; and hence no debtor and no creditor; so that the distinguishing elements of an appropriation in the proper sense are wholly lacking.

An attempt has been made to bring this so-called appropriation within the operation of the rule laid down by this Court in the case of United States v. Realty Company, 163 U. S., 440, 444. But in that case there was a debt equitably due from the United States to those persons who had produced sugar in this country in pursuance of the sugar bounty provisions of the revenue Act of 1890; which debt Congress had seen fit to recognize as binding in conscience, though not in strict law, and had provided for its payment in the sundry civil appropriation Act of 1895, not by a mere covenant to pay, but by an appropriation in regular form. In that case the claimants came into a Court of Equity with clean hands, asking for the payment of money for services already rendered, and al-

ready acknowledged by Congress, and not as parties to a contract against public policy—a covenant involving bad faith and an effort to defeat a charitable use, besides violating numerous express provisions of the Constitution. Nothing is due this railroad company, and the provision to pay it money in future is only a hypothetical, and not a real, appropriation. The Treasurer would not be justified in paying it one penny without a further appropriation regularly made after the happening of the event upon which the present promise to pay is founded. It is wholly unlike any of the measures referrd to as examples by the learned justice who delivered the opinion of the Court of Appeals. All those examples related to the current and legitimate expenses of the Government, and were not mere covenants to pay money to particular persons or corporations for improving their own property, or for releasing and surrendering fictitious rights based upon notoriously unconstitutional enactments.

Sections 3, 14, and 16, of the Act of 1901, being void, the legal title to the property on the Mall remained in the United States, and the equitable or trust estate remained in the District government, which held it as a trustee for educational purposes, according to the terms of the Act of 1872. If the municipal corporation itself had been dissolved by the Act of 1901, the trust estate would have devolved upon the United States, to be administered by it, as trustee, with due regard to the objects and purposes of the charitable use to which the property had been originally devoted.

Mormon Church Case, 136 U. S., 1, 47, 48.

And since the District has, by reason of acts to which this railroad company was, and is, a party, been despoiled of the revenues from its estate in the Mall, and cannot now recover that estate as it previously existed, or receive any further revenue from it, the predatory company should, in equity and good conscience, be compelled, if this legislation is sustained, to make restitution to the District by the payment of $1,275,000 out of the $1,500,000 which Congress has covenanted to pay it for

evacuating the Mall; or else it should be declared a trustee of that sum for the District's use and enjoined from drawing any part thereof, out of the Treasury of the United States in pursuance of this unrighteous and inequitable bounty, bestowed at the expense of a charitable use, and in consequence of Machiavellian tactics on the part of the recipient. For it is a well-settled rule that wherever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the Court will raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who are in equity entitled to the beneficial enjoyment. Burrill's L. D., title "Constructive trust." Hill on Trustees, 116.

The provision for payment to be made by the United States out of its separate revenues, if considered apart from the rest of the Act, looks like an attempt to relieve the District of increased taxation resulting from the loss of its school endowment, by placing the whole burden of costs on the National Treasury, so far as the Philadelphia, Baltimore and Washington Railroad Company is concerned. But there are other provisions in the act, by means of which the expenses of the District as compared with those provided for in 1901, are increased at least $702,500, in consequence of this Union Station scheme. The cost of the plaza, and of opening new streets, and the payment of damages resulting from the new plan, make the "actual money cost" to the District in addition to the loss of its endowment, nearly five times as great as it would have been under the Act of 1901. These additional expenses were entailed by the second and fourth clauses of section 5 of the Union Station Act, which are as follows:

"The Commissioners of the District of Columbia are hereby authorized and directed to cause all streets, avenues, ways, and alleys to be closed as provided in this Act, and in accordance with the intent thereof; and also to lay out a circle or

plaza at the intersection of Massachusetts avenue and Delaware avenue, and to lay out and open streets leading to such circle, and to change the lines of certain other adjacent streets and of Ivy street, as shown on a plan filed in the office of the said Commissioner, and also to make such changes in the lines and grades of any existing street, avenue, or way and in the recorded plans of street extensions as may be reasonably required, deemed necessary, or advisable in the construction of the works hereby authorized. And authority is hereby given said Commissioners to acquire by purchase, or to condemn in accordance with existing law, the land necessary to carry out the proceedings authorized by this act, and to reconstruct, grade, and pave, by day labor or otherwise, the streets, avenues, and ways changed in line or grade or newly created hereunder."

"All damages to adjacent property owners resulting from, incidental to, or connected with changes in the grades of the streets or alleys authorized by this Act shall be borne, paid for and defrayed by the District of Columbia, and shall be recoverable by action of law against the said District on the part of the owners of the property so damaged. Fifty per centum of the amounts so recovered shall be refunded to the said District by the United States: Provided, That in determining the damages as herein provided the jury shall take into consideration any benefits that may have accrued by reason of the elimination of grade crossings or of the location of said station in proximity to the property alleged to have been damaged."

Now, in a report on "Railroad Terminals in the District of Columbia," dated March 27, 1902, the Commissioners of the District gave a summary of the estimated cost of the Union Station project, as follows:

1. "To be paid by the United States, $1,500,000, to the Baltimore and Potomac Railroad for the evacuation of the Mall.

2. "To be paid, half by the United States and half by the District, $1,500,000, to the Baltimore and Ohio Railroad, as per Act of February 12, 1901; besides $620,000, cost of grading and paving; $500,000, real estate to be purchased; $550,000, damages to property," under this act. (S. Doc. No. 220, p. 225).

The last three items foot up $1,670,000, to be expended in addition to the amounts given directly to the railroads for their provate use; and half of this sum, or $835,000, besides $750,000 to the Baltimore and Ohio Railroad, is to be paid by the District out of its revenues, which are collected almost exclusively by means of direct taxation. But according to the reports of the District Commissioners, the total estimated cost to the Government; that is, to both the United States and the District of Columbia, under the two acts of 1901, on account of approaches and damages, was $250,000 on the line of the Baltimore and Potomac Railroad, and $15,000 on the line of the Baltimore and Ohio. (S. Doc. No. 220, pp. 165, 191). Half of this would leave $132,500, as the District's share of expenditures under those acts for grading and paving, and damages. Deducting that sum from the $835,000 required to be paid by the District for grading and paving, real estate, and damages in consequence of the enactment of the 2d and 4th paragraphs of section 5 above quoted, there remains $702,500; all of which may be regarded as an outlay on accoount of improvements necessarily incident to the change made with reference to the Baltimore and Potomac Railroad by substituting the Act of 1903 for that of 1901. The District's estate in the taxes arising from the property occupied by the railroad on the Mall, which had been capitalized at $1,275,000, and given to the railroad company outright by the Act of 1901, was not restored to it by the Act of 1903, and may justly be added to the $835,000 in money, as a part of its forced contribution to the expenses of this project. So that the cost to the District may be summarized as follows:

1. Cost of grading and paving, real estate, and damages, $835,000.

2. Value of estate on the Mall taken from the District school fund, $1,275,000.

3. Amount paid to the Baltimore and Ohio Railroad, $750,000.

Total, $2,860,000.

This legislation, then, was not adopted for the purpose of aiding the revenue of this District in effecting objects which the revenues of the District should effect. It was adopted, on the contrary, to secure an extraordinary improvement of the city of Washington, regarded with special reference to its condition as the National Capital. If these improvements are such as the United States should pay for, the money should be advanced from the Treasury in the regular way, and raised by taxes on the whole country, or by loans, in a constitutional manner; and the taxes imposed on the people of this District by this legislation for the purpose of making these improvements should be declared unconstitutional. They undoubtedly are so, if the people of Washington are being taxed for purposes purely national, or purposes not purely local and municipal.

This view is in strict conformity with Judge Cooley's opinion in People v. Town of Salem, 20 Mich., 452, 474-5, where that great jurist, after declaring that a tax is invalid if it is "arbitrary or capricious" in respect to its apportionment, added:

"If the tax is imposed upon one of the sub-divisions of the State only, the purpose must not only be a public purpose, as regards the people of that subdivision, but it must also be local, that is to say, the people of that municipality must have a special and peculiar interest in the object to be accomplished, which will make it just, proper, and equitable that they should bear the burden, rather than the State at large, or any more considerable portion of the State. The principles here stated are fundamental maxims in the law of taxation. They inhere

as conditions in the power to impose any taxes whatever, or to create any burden for which taxation is to provide."

If it be said that the apportionment in this case is equitable because the District has a special and peculiar interest in these improvements, I answer that the benefit to be derived from them are purely incidental, since the District receives no stock in the company nor any property interest in the improvements themselves, and is, moreover, deprived of a right to tax them, as it may tax all other private property. Incidental benefits have never been regarded as sufficient to support taxation. And, moreover, this legislation disregards the mandatory provisions of the Constitution itself. The power to determine what is, or is not, an equitable apportionment of taxes for Federal uses, has been expressly denied to Congress. A strict rule of apportionment has been fixed by the Constitution in such cases; and a literal compliance with that rule is a condition precedent to the validity of any tax law passed by Congress.

Pollock v. Farmers' Loan & Trust Co., 157, U. S., 429.

Wilkes County v. Color, 180 U. S., 506, 513-525.

In speaking of the revenues of the city of Washington, Chief Justice Marshall, after the most mature deliberation, said:

"These revenues are raised by laws whose operation is entirely local, and for objects which are also local; for no person will suppose that the President's house, the Capitol, or the Navy Yard, or other Federal institution, was to form a charge on the city revenue. Coming in aid of the city, they are of the same character with it."

Cohens v. Va., 6 Wheat., 264, 446.

The revenues of the District of Columbia are of the same nature. They come in aid of the municipal corporation, and are of the same character with it. They cannot, under the Constitution, be applied to the upbuilding of those public institutions which belong to the National Government or which, like this great Plaza and Station project, are designed for na-

tional purposes. They do not belong to the National Government, but to the local corporation. They can be raised only by laws which are entirely local, and for objects which are entirely local. Congress has no right or power to apply them to any object which is not entirely local in the sense of being entirely municipal. This is, no doubt, what Chief Justice Marshall meant when he said in Loughborough v. Blake (5 Wheat., 317, 325), that the Constitution protected the people of this District from oppressive taxation, by Congress, by reason of its provisions concerning direct taxes.

The character of the work contemplated by this legislation proves, of itself, that not even its most ardent advocates ever thought of it as a purely local enterprise; but rather as purely national in its character and uses, so far, at least, as those uses were public.

It was clearly understood to be such by the Senate Committee on the District of Columbia. For, in their report on Senate Bill No. 4825, presented April 3, 1902, that body said:

"The Massachusetts Avenue site also benefits the Government Printing Office, removing the car-shifting and smoke.

"The new station will be the finest structure of its kind in the world. Its length will be 760 feet, which is 8 feet 8 inches longer than the Capitol itself. It will be built of white marble, with the interior of marble and stone. The classical style of architecture will be used, and the building will be so located and designed that, while distinctly subordinate to the Capitol, it will rank among the great public structures in Washington. The minimum cost of the station has been placed at $4,000,000, but the total cost will be nearer $5,000,000. * * * A private entrance is provided for the use of the President of the United States * * * and ample accommodations are provided for bodies of troops and great delegations arriving and departing at inaugural times, or when large gatherings occur at the Capital. In a word, every pro-

vision has been made for a great, dignified, convenient, accessible gateway to the Capital of the Nation."

(S. Doc. 220, p. 214.)

The reports of the Committees of both houses of Congress and of the District Commissioners, and the speeches of the advocates of the measure in Congress, all tend, like the foregoing extract, to show that the whole scheme was designed for the incidental benefit of the United States in the improvement of their National Capital, as such. Such a use will not support direct taxation, unless the taxes be laid in proportion to the whole number of citizens of the United States, excluding only Indians not taxed; and it was held in Miles Planting Co. v. Carlisle, 5 D. C. App. 138, that it would not support taxation at all.

It is alleged in the bill in this case that the tax provision of the Act of Congress, approved February 28, 1903, including those portions of the two Acts of February 12, 1901, which are incorporated into it, is unconstitutional, null, and void, because it levies a direct tax in respect of the real estate held and owned by myself n the District of Columbia, which direct tax is not, in and by said Act, apportioned among the several States, as required by Section 2 of Article 1, of the Constitution of the United States; and also because it is in violation of clause 4 of Section 9, Article 1, of the Constitution, which expressly forbids the laying of any direct tax by Congress, unless in accordance with the rule established in the second section.

"Taxes on real estate are indisputably direct taxes." (157 U. S. 429.) And hence the Supreme Court of the United States, in applying the constitutional provisions on this subject to the income tax provided for in the revenue Act of 1894, known as the Wilson Bill, held that the tax imposed by sections 27 to 37, inclusive, of that Act, so far as it fell on the income from real estate, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those

sections, constituting the entire scheme of taxation, were necessarily invalid. (158 U. S., 601.)

In the Loughborough-Blake case, Chief Justice Marshall declared that the people of the District of Columbia, notwithstanding their lack of representation in Congress, were clearly and fully protected by the apportionment provisions against the oppressive exercise of the taxing power by Congress; that no direct tax could be laid upon them for any Federal purpose, unless the Constitutional rule of apportionment was observed. (5 Wheat., 317, 325.)

On the 4th of April, 1796, the House of Representatives, recognizing its exclusive right, under the Constitution, to originate bills for raising revenue, passed a resolution instructing the Secretary of the Treasury to "report a plan for laying and collecting direct taxes by apportionment among the several States agreeably to the rule prescribed by the Constitution." (158 U. S., 610; 7 American State Papers, 1 Finance, 414-431.)

The Act of May 28, 1796, was passed according to the principle stated in this resolution; laying direct taxes by apportionment agreeably to the rule prescribed by the Constitution. So, too, were the acts of July 14, 1798; August 2, 1813; January 9, 1815; and numerous direct tax laws resorted to in consequence of the Civil War. Never until the Act of 1894 did Congress deviate from that rule in laying direct taxes; and that act was annulled, as to such taxes, as soon as it was subjected to judicial interpretation.

If the money sought to be appropriated by virtue of the act in question had been appropriated out of any moneys already in the Treasury of the United States belonging to the District of Columbia, instead of being appropriated out of the revenues of the District of Columbia to be collected by taxation after the passage of the act, still the law could not, as it stands, be properly called an appropriation bill or act, and would, moreover, fall within the purview of the Constitutional provisions respecting revenue bills, and of that forbidding the

drawing of money from the Treasury unless in pursuance of appropriations made by law. These provisions would be nugatory if they could be evaded by acts which put money into the Treasury and draw it out, uno flatu. The line of demarcation between taxation and appropriation would in that case be destroyed entirely.

It is as tax laws that this legislation is opposed, primarily. And it is because they are invalid as tax laws, that the Court is asked to restrain the Commissioners of the District of Columbia from carrying them into execution. It is because no oney can be Constitutionally put into the Treasury by operation of such laws, that the Court is asked to restrain the Treasurer of the United States from paying out of the Treasury any money which may be put into it in pursuance of them, and, hence, as the result of depriving the people of this District of their property without due process of law and without just compensation. (Const. Am. 5.)

Mr. Madison says:

"A power to impose unlimited taxes for unlimited purposes could never have escaped the sagacity and jealousy which were awakened to the minute powers that were criticised and combated in those public bodies," (the State Conventions.)—4 Madison's Writings, 134.

"The Constitution is a limited one, possessing no power not actually given, and carrying on the face of it a distrust of power beyond the distrust indicated by the ordinary forms of free government."—4 id. 135.

"There is a broad distinction between an abuse of a power actually delegated to Congress, and the usurpation of a power not delegated."—4 id. 238.

It is impossible that a power to collect money by taxation from this District, to be used in advancing the interests of a private corporation or effectuating a project of improvement purely Federal, even under color of a contract, could have been smuggled into the Constitution, under the general welfare clause or "the sweeping clause."

It may elucidate this subject somewhat to refer to a ruling of the Chairman of the Committee of the Whole House, when this bill was under consideration in that body; since that ruling, which was not appealed from shows that it was then regarded as a bill for the raising of revenue by taxation.

On the 15th of December, 1902, Mr. Cannon, Chairman of the House Committee on Appropriations, offered the following amendment to Senate Bill No. 4825:

"Insert at the end of line 18, page 28, the following:

"That in order to meet the extraordinary expenses entailed by the provision of this act, the rate of taxation on the assessed real and personal property in the District of Columbia for each of the next five fiscal years is hereby increased 25 per cent."

Mr. Mudd made the point of order against the amendment that it was not germane to the bill, and said:

"Taxation is entirely foreign to the subject-matter of this legislation, and I think the amendment is clearly subject to the point of order. It might with just as much propriety be contended that we could impose a tariff upon certain foreign articles for the purpose of raising revenue in this same bill in order to meet the increased expenditure imposed by it upon the United States Treasury. It would be just as germane as this."

After considerable discussion, the Clairman ruled as follows:

"This is a bill to provide for a union railroad station in the District of Columbia, and for other purposes. It is reported from the Committee on the District of Columbia. It provides for the establishment of a park in the District of Columbia and for the opening of streets, and imposes considerable expense upon the District of Columbia.

"It also imposes some expense upon the Treasury of the United States. If, as has been suggested, an amendment were offered increasing the tariff upon imports to meet such charges the objection would at once be made that under the rules such

a measure must be referred to a different committee—the Ways and Means. In other words, the rules of the House would make an amendment touching the tariff not germane to such a bill as this.

"But with the District of Columbia the case is different. If the amendment of the gentleman from Illinois were offered as a separate measure, it would go, under the rules, to the same committee which has reported this bill. The District Committee has jurisdiction of revenues as well as expenditures, and could, without infringing any rule, include in one bill the purposes of the bill and also of the amendment. While not entirely clear from doubt, the Chair is of the opinion that the amendment providing revenue to meet the expenditures entailed by the provisions of the bill itself upon the District of Columbia is germane to the bill, and therefore overrules the point of order."

(Congressional Record, vol. 36, pp. 132, 133.)

Arguing for the adoption of his amendment, Mr. Cannon said:

"The taxing law in the District on the amount of property that we reach is levied at 1 1-2 per cent on two-thirds valuation; that is to say, property that is valued at 66 cents on the dollar pays a cent and a half on the two-thirds valuation. This amendment increases it, if adopted, 25 per cent. That would make a cent and three-quarters on the two-thirds valuation. As nearly as I can tell on a hasty guess five years will be about sufficient to meet these extraordinary expenses."

It is not difficult to deduce from all this, that taxation was of the essence of the bill; that an amendment increasing taxes 25 per cent was, therefore, germane to the bill (germanus, of the same stock, of the whole blood, so to speak, with the bill itself); and that for five years from its passage taxes must in some way be increased 25 per cent in order to meet the expenditures requird by it. Is it not sophistical and contentious to say of such a bill, that "it is not for the raising of revenue, but at the utmost a bill for the expenditure of

revenue?" Is it not equally so to call it "an appropriation bill, where the appropriation is incidental to some other purpose?" Are not the examples cited by the Court of Appeals (Record, p. 30) to illustrate the meaning of its new-coined phrase, "appropriation bill where the appropriation is incidental to some other purpose," sufficient to show the utter fallaciousness of its opinion? It assumes, contrary to the known fact of the case, that "every bill granting a pension, every bill providing for an additional employee in an executive department, every bill providing for an additional circuit or district judge of the United States, every bill providing for an additional vessel for the navy or an additional regiment for the army" provides for direct taxation as this bill does, that they are in all respects similar to this bill; and that a provision n such blls laying taxes excusively on this District would be merely a legitimate incident to some other purpose. If its illustrations mean anything, they mean that the Court is mistaken. And to say that all such bills as it enumerates "would be outside the range of consideration of the Senate until they had been acted on by the House of Representatives," if such bills as this were constitutionally barred from originating in the Senate, is simply to draw a conclusion contrary alike to fact, and to the judgments of the House of Representatives and the Senate in all former cases, as I shall show.

It is easy to see from the history of its passage, and especially from the proposition of Mr. Cannon, and the Chairman's ruling, that this Union Station tax bill is in no proper sense an appropriation bill, or a mere contract, or a police regulation. Mr. Mudd's idea, which is exactly expressed in different language by the Court of Appeals, was rejected by the House; which held that taxation was not at all foreign to the subject matter of this legislation, and that the amendment to increase taxes 25 per cent was not subject to the point of order; but admitted that Congress might with just as much propriety impose a tariff upon certain foreign articles for the purpose of raising revenue in the same bill, in order to meet the

increased expenditures imposed thereby upon the United States Treasury, as to lay taxes on this District to raise revenue for defraying its share of the expenditure required.

The opinion of the Court of Appeals sustains Mr. Mudd's position on both points, though manifestly contradictory, and overrules that of the Chairman and the whole House on the first point. But if Mr. Mudd's second point was well taken this bill is void. If the Chairman of the Committee on Appropriations had warned the House that a horizontal increase of even one per cent in the tariff would be necessary to carry the scheme into execution, who is bold enough to say that this legislation would now encumber the statute book? Who does not know that it would have met with universal opposition, and that the fact that the bill had originated in the Senate would have been noticed by some member? But it makes some difference whose ox is gored. Bastard legislation is often thought good enough for those who have no voice in making laws.

"Stewards of the Judgment,
Suffer not this thing."

The point that the bill originated in the Senate was not raised in the House. But at a later date, following a long line of precedents, the House firmly insisted upon its exclusive right to originate all bills imposing taxation, or affecting the revenue in any manner whatever; and the Senate, as usual, recognized that right. See Congressional Record, 58th Congress, 1st session, for February 16 and 17, 1905.

In that affair, the House had passed the annual agricultural appropriation bill; to which the Senate had made a great number of amendments, the 208th of which was as follows:

"That paragraph 234 of the Act of July 24, 1897, entitled 'An act to provide revenue for the Government and encourage the industries of the United States,' shall not be held to be affected by the provisions of section 30 of said act."

Paragraph 234 of the tariff bill referred to provides for a duty of 25 cents a bushel on wheat imported into the United

States. Section 30 provides for a drawback of 99 per cent of the tariff paid on imported articles which enter into the manufacture of articles afterwards exported from the United States. In other words, the amendment abolished the drawback clause in the Dingley bill on wheat imported into the United States and afterwards manufactured into flour and exported.

When the bill, as thus amended, went back to the House in due course, Mr. Payne, of New York, offered the following resolution:

"Resolved, That the amendment No. 208, added by the Senate to the House bill H. R. 18329, in the opinion of this House, contravenes the first clause of the seventh section of the first article of the Constitution of the United States, and is an infringement of the privileges of this House, and that the said bill, with the amendments, be respectfully returned to the Senate with a message comunicating this resolution."

This resolution was adopted—yeas 263, nays 5.

The speech delivered by Mr. Payne in support of this resolution furnishes a very complete brief on this subject; and in the absence of any direct judicial construction of the term "revenue bill" (other than that in Bank v. Nebeker and similar cases, declaring that certain duties, charges, or fines, do not constitute revenue within the meaning of the constitutional provision) I ask the Court's attention to it, and also quote freely from it, in order to show the legislative construction which has been placed upon that provision ever since 1789:

"In the House on June 25, 1789 (1st Cong., Annals, vol. I, pp. 592, 593, 597 603 605 607), the First Congress, Madison, Livermore, Gerry, Lawrence, and Tucker contended that the sole right of originating money bills belonged in the House—this was on an appropriation bill—but that this clause covered also all appropriation bills, because an appropriation bill was an appropriation of the moneys raised by the revenue powers of the Government, and therefore was included; and

since that time, as we all know, the appropriation bills of the Government—the supply bills—have originated uniformly in the House of Representatives, with perhaps a single exception, which I will note later, and which failed to become law.

"In 1831, February 11, in the Senate, Mr. Thomas H. Benton asked leave to introduce a bill for the gradual abolition of the duty on alum salt. This bill was opposed because it belonged to a class of revenue bills which the Senate did not have the right to originate. After debate, leave to introduce the bill was refused—yeas 17, nays 27—and in that case the Senate affirmed the right of the House.

"Also in the Senate in 1833 (Twenty-second Congress, Debates, vol. IX, pt. 1, pp. 462, 473, 477 478 722) where the tariff bill introduced by Mr. Clay was discussed and tabled, Messrs. Webster, Clay, Dickerson, and Forsythe denied the right of the Senate to originate a revenue bill. In the House in 1837 (Twenty-seventh Congress, Debates, vol. XIV, pt. 1, pp. 1152, 1153, 522), where a Senate billl authorizing the issue of Treasury notes was, on September 30, discussed in Committee of the Whole and considered an invasion of the prerogatives of the House. As a result of the discussion, the Senate bill was laid aside and a House bill on the same subject passed. This latter bill passed the Senate. In the Senate in 1842-43 (Twenty-eighth Congress) where, on January 19 to May 31, 1843, Mr. McDuffie's bill to revise the compromise tariff of 1833 was debated and by a vote of yeas 33, nays 4, was decided to be such a bill as could not originate in the Senate. In the Senate in 1855 (Thirty-fourth Congress, Globe, January, 1856, pp. 160, 161, 162, 375 376) where the Senate in opposition to the influence of Messrs Seward and Sumner, originated two general appropriation bills, which were afterwards tabled by the House."

The particular precedent followed by the House on February 16, 1905, should, it seems to me, govern the Court's action in the present case. Mr. Payne said:

"On June 30, 1864, Mr. Thaddeus Stevens introduced a resolution, and the resolution which I have offered to-day is substantially a copy of the one introduced by Mr. Stevens, in regard to the bill to regulate and provide for enrolling and calling out the national forces, which had been returned from the Senate with amendments, one of which provided for a 5 per cent duty on all incomes to meet the cost of paying bounties and enforcing the draft. Mr. Stevens said:

"'It is so clearly a violation of the privilege of the House that I think it ought not for a moment to be acquiesced in.'

"Without further debate the House agreed to the resolution. The same day a message from the Senate announced that the Senate, on reconsideration, had again passed the bill with all amendments previously concurred in, except the amendment objected to by the House of Representatives."

Clearly the tax on incomes in the Senate amendment referred to by Mr. Payne was laid for some "other purpose" besides the mere design to raise revenue; just as the tax provided for in this Union Station act is. The House declared, however, and the Senate agreed, that the tax feature in that amendment gave a new character to the whole bill, and made it a revenue bill within the meaning of Art. 1, section 7, clause 1, of the Constitution. And it refused, notwithstanding the stupendous magnitude of that "other purpose," which was no less than the preservation of the Union itself, to make any concession to the Senate, which might imply in that body a right to originate taxation of any kind for any purpose, to any extent. To originate any tax was held to be ultra vires of the Senate, even though originated by way of an amendment to a House bill for any purpose, the same or other; and hence to pass such a measure, so originated, must be ultra-vires of Congress.

I take it that the doctrine of ultra vires, as laid down by this Court in numerous cases, and especially in the opinions delivered by the late Justice Miller, control the present case.

Now, both of the lower courts, in disposing of this case, laid great stress upon the pretext of the defendant corporations, that the primary object of this legislation was not taxation but "another purpose;" and both of those courts held that the taxes imposed on the taxable property and privileges of this entire community by the said acts (31 Stat., 771, 778, 779, and 32 Stat., 914, 915, 916) were not "taxes," in the strict sense of that word, but were "incidental taxes" whose nature was to be determined, not from that of the objects on which they might fall, but from extraneous circumstances depending upon the questions whether the appropriations which were made out of them were gratuities or not, and whether the primary object of the legislation imposing them was or was not the elimination of grade crossings in the exercise of the police power; treating the taxes in question as if they were of the nature of seigniorage, or postage, or of revenue in the sense of profits, not arising from taxation strictly speaking, which might incidentally accrue as a casual result of a special duty imposed for another purpose, such as that laid by the national banking act of 1864 on the average amount of notes circulated by a banking association; which was laid for the purpose of reimbursing the Government for its antecedent outlay in preparing such notes to be used by the banks in their private business.

There is positively no authority whatever for such a construction. The doctrine found in Story on the Constitution, section 880, and in Bank v. Nebeker, on which the lower courts and the defendants rely, contradicts it flatly, and is completely in accord with the action of the House of Representatives on June 30, 1864, respecting the Senate amendment adding an income tax provision to the bill for enrolling and calling out the national forces. Nor does that construction derive any support from the opinion of this Court in the case of New York and New England Railroad Company v. Bristol, 151 U. S., 556, 567, which was a case arising under the 14th Amendment, in which this Court held that the public

authorities might compel a railroad company to pay the entire costs of eliminating grade crossings without violating that amendment. I rely on that case myself.

The case of Bank vs. Nebeker turned on the question whether the tax on the average amount of national bank notes circulated by the Twin City Bank of New Brighton was a "tax in the strict sense of the word," or only an "incidental tax." This Court held that it was not a true tax, or "tax in the strict sense of the word," because it fell, not upon the public, but upon the particular associations which voluntarily took advantage of the national bank act and received printed notes for their own use at the expense of the Government. But here, the tax falls wholly on the public, and not on the corporations, as I contend it should fall in order to take this case out of the operation, cl. 1, sec. 7, Art. 1, of the Constitution.

The persons who pay incidental taxes receive some specific benefit for their money; but those who pay direct taxes—taxes in the "strict sense of the word"—do not. This is the doctrine laid down by the courts in Bank vs. Nebeker, and by Judge Story in his Work on the Constitution, section 880.

In the Nebeker case Justice Harlan, speaking of the National Bank act of 1864, said:

"There was no purpose by the act, or by any of its provisions, to raise revenue to be applied in meeting the expenses or obligations of the Government." (167 U. S. 203.)

If it had been a provision for raising revenue to be applied in meeting the expenses or obligations of the Government, it would have been held unconstitutional on the ground that it did not originate in the House of Representatives. Otherwise the words above quoted would be meaningless, or else they would involve a false implication.

I contend that the words "levied," "assessed," "taxable," and "revenues," as used in the acts in controversy, import "taxes in the strict sense of the word," taxes entirely different from seigniorage, postage, fines, or escheats.

According to Webster's Dictionary (edition of 1904), the word "levy," as a verb, means "to assess and collect by authority or force." The verb "to assess" means "to set or fix a certain sum against (a person or property), as a tax, fine, or forced contribution" . . . "to fix the value of property for the purpose of being taxed." The adjective "taxable" is a derivative from "tax," and means "liable by law to the assessment of taxes; as taxable estate." The noun "revenue" means "the annual income from taxes, excises, customs, duties, rents, etc., which a nation receives into the treasury for public uses." Revenue includes taxes; and taxes are always understood when revenue is mentioned, unless specially excepted. In these acts taxes are not excepted; but in the Act of 1901, every other kind of revenue is specially excluded.

In Loan Association v. Topeka, 20 Wallace, at page 664, Justice Miller quotes with approval the definition of the word "tax," as given in Webster's Dictionary, where, as a noun, it is defined to be "a rate or sum of money assessed on the person or property of a citizen by a government for the use of the nation or state" . . . "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."

In Hanson v. Vernon, 27 Iowa, at page 47, Judge Dillon collects a number of definitions of the noun "tax," all of which substantially agree with that approved by Justice Miller in Loan Association v. Topeka.

Judge Cooley, in People v. Town of Salem, 20 Mich., 452, 474, says: "Taxation is a mode of raising revenues for public purposes only." But, as this Court pointed out in its opinion delivered May 29, 1905, in the New York Franchise case: "The word tax is not infrequently used in a general sense as denoting a burden or charge and not in a strict legal sense of a charge or burden imposed by the State for the purpose of revenue for its support."

What, then, is a tax in the strict sense of the word? It is clearly (1) a sum of money (2) levied and assessed (3) at

a fixed or certain rate or per cent (4) upon persons or property (5) by a legislature (6) for a government use only. If these assessments are not taxes it must be because they are not for a governmental use; and in that case they constitute robbery.

I say, then, that the assessments provided for by these acts, if taxes at all, are strict, and not incidental, in their nature. According to the Standard Dictionary (edition of 1895), the word "strict" means "exactly defined; restricted to exact meaning; accurate; not wide or loose." And, according to the same authority, "incidental" means "coming as a result or adjunct of something else; happening or coming without regularity or design; foreign to the general purpose; occasional, casual."

In the light of these definitions, the language used by Congress, as above quoted, imports taxation in the strict sense of the word; and, therefore, I say that the "revenues" derived from those taxes are not revenues "happening or coming without regularity or design," nor "foreign to the general purpose" of the acts imposing them; nor "casual" and "occasional;" and hence that they are not incidental. If Congress did not intend, directly and unequivocally, to lay a burden or charge upon the persons and property of this community to raise money for public purposes, the terms it used were extremely ill-chosen. If it did so intend, the acts are void; because the Senate, in originating those acts, not only exceeded its own powers, but assumed a power which could be lawfully exercised only by the House of Representatives; and the concurrence of the latter body in the usurpation could not cure the defect of power in the former; because the House had no authority to ratify a usurpation committed by the Senate.

But this is not all. The language used by Congress, both in the acts and in the debates, imports an unmistakable intention to lay a direct tax; for the term "property" includes land, and a tax on land has always been held to be a direct tax, and was admitted by Mr. Babcock to be such when the bill was

pending. The word "direct" signifies "plain, express, exact, positive, not ambiguous, not inferential." How can such a tax—a plain, express, exact, positive, unambiguous, direct tax— be properly called an "incidental tax?" How can revenue derived from such a tax be called "incidental revenue"—revenue happening or coming without regularity or design? How can it be said that acts laying such taxes are not acts for raising revenue? How can it be said that such acts may properly originate in the Sentae, if only the sums collected and appropriated under them be not gratuities but payments, or be levied in the exercise of the police power? Of what use is it to talk about money levied and appropriated, uno flatu, as being payments under contracts, and not taxes? Where does Congress get the power to appropriate money not yet in the Treasury, but to be collected in the future by means of taxes imposed for a particular object not in itself governmental? Where is the grant of such a despotic power? Calling such a power by the vague name of police power does not suffice.

When the people granted to Congress the power to lay and collect taxes, etc., to pay the debts and provide for the common defense and general welfare of the United States, they annexed to that grant, as a condition precedent to the validity of any tax whatever which Congress might see fit to impose, the qualification that "all," not some, "bills for raising revenue shall originate in the House of Representatives." The power to originate such bills was thus made distinct from the power to pass them. It was made a separate and substantive power, not to be exercised at all except by the people through their immediate representatives in the popular branch of Congress. And this was done in order that the initiation of tax laws might remain, to all intents, under the control of the people themselves. The right to the initiative in measures providing for taxation, direct or indirect, being in this manner delegated exclusively to their immediate representatives, responsible directly to themselves alone, could not

be redelegated or surrendered by those representatives. The bill laying the tax must originate with the people's representatives. (Cooley on Taxation, 3d edition, 95-96.)

There is a manifest, persistent effort to dodge the real issue in the case—a constant recurrence to the old fallacy of ignoratio elenchi—which shows that the appellees rely for success upon the substitution of a false issue for the real issue, by talking about "appropriation bills and contracts."

The question here is, not merely or primarily whether an "appropriation," made as such, is void or valid, but whether a tax "levied and assessed upon the taxable property and privileges in the District of Columbia," for any possible use, is void or valid, if it be a tax on property, authorized or provided for by a statute originating in the Senate?

Let us not confound taxation and appropriation. These are not equivalent terms. The appellees recognize the difference between them by the defense which they set up, in behalf of the Philadelphia, Baltimore and Washington Railroad Company; for that defense rests entirely on the difference between a "tax" and an "appropriation." They say that there was "a valuable consideration" for the $1,500,000 appropriated to the Philadelphia, Baltimore and Washington Company by the Act of 1903, and that "no part of that money was to come out of the revenues raised by taxation in the District of Columbia."

Here they contrast money appropriated with taxation. Are two contraries the same thing? Their logic is as bad as their law or their history. I have already shown how the railroad company obtained the "valuable consideration" they speak of—how the District school fund, how the children of this community, were robbed, in order that a ruthless corporation might gain something to be offered as a "valuable consideration" to the people of the United States as a pretext for plundering their treasury as well as that of the District. Now since they set up their wicked claim to the property on the Mall, as the only consideration for the appropriation, or

rather the covenant, to pay that company $1,500,000, I reply that the people of this District must be taxed to restore that sum to their school fund, unless this Court should see fit, in accordance with my prayer for general relief, to make a decree establishing a constructive trust, and declaring that company a trustee of the $1,500,000 for the use of the District School fund, to which it equitably belongs.

The entire case of the defendants is founded upon a fallacious presumption.

In their brief in the Court of Appeals, at page 16, they maintained the following proposition:

"The Act of February 28, 1903, from the recitals in its enacting clause, and the fact that it has received the approval of the President, and has been regularly enrolled among the statutes of the United States, must be presumed to have been passed by Congress in strict accord with the letter and spirit of the Constitution, and resort cannot be had to the journals of the two Houses to overthrow this presumption."

And while the Court of Appeals did not, in terms, adopt the same view, yet it did so by implication. For, though it admitted that the acts did originate in the Senate, it gave full effect to the proposition that these acts "must be presumed to have been passed by Congress in strict accord with the letter and spirit of the Constitution;" and as its reason for so doing suggested that I had cited no case in which this Court had held such acts as these to be unconstitutional. If that Court had read carefully the opinions of this Court cited in my brief, it would have seen that I did cite cases showing precisely that thing. I cited the case of Pollock v. Farmers' Loan and Trust Company (the Income Tax Cases), where such an act was treated as a nullity; and I also cited the following cases bearing upon another phase of the subject:

Wilkes County v. Coler, 180 U. S., 506, 513-525.
Town of South Ottawa v. Perkins, 94 U. S., 260, 263.
Post v. Supervisors, 105 U. S., 657, 667, 668.
Bank v. Nebeker, 3 D. C. App. 190, 200, 201.

Same Case, 167 U. S., 196, 203.

In Post v. Supervisors, supra, this Court said:

"If the journals being produced or proved, fail to show that an act has been passed in the mode prescribed by the Constitution, the presumption arising from the signature of the presiding officers and the Executive, is overthrown, and the act void." (105 U. S. 668.)

In town of South Ottawa v. Perkins, supra, this Court, speaking of an Illinois law, said:

"No act can be deemed a law, unless by the journals of the legislature, it appears to have been regularly passed." (94 U. S., 263.)

And further on this Court said that it becomes the "duty of the Courts to take judicial notice of the journal entries in that regard." (94 U. S., 263.)

In the case of Wilkes County v. Coler, supra, this Court went still further, and declared that all Constitutional provisions imposing restrictions on the legislature respecting taxation must be literally complied with, because the very object of such restrictions is to create a condition precedent to any valid legislation imposing taxes on the people.

Mr. Justice Harlan, who delivered the opinion in that case, after citing and approving Town of South Ottawa v. Perkins and Post v. Supervisors, supra, and distinguishing Field v. Clark, 163 U. S., 649, laid down two propositions of law, which, mutatis mutandis, show what must be presumed in regard to the present legislation, and what must not be presumed. I state them serially:

1. "When an enrolled bill, certified, and duly authenticated by the presiding officers of the two Houses, is approved by the Governor, it is to be conclusively presumed that the Constitution was complied with, as to the mere readings of the bill.

2. "No such conclusive presumption can arise to defeat the express Constitutional inhibition upon the passage of an act authorizing a county, city or town to impose taxes upon

the people 'unless the yeas and nays on the second and third readings of the bill have been entered on the journal;' the object of that provision being to make such an entry on the journal a condition precedent to any legislation imposing taxes on the people." (180 U. S., 521, 522.)

I appeal to the Journal of the Senate, and the Congressional Record, as proof that the bills in question were read and entered properly, and also that they originated in the Senate, and passed that body before they reached the House of Representatives.

If we substitute, in the second proposition, the clause "unless the bills originate in the House of Representatives," in place of the clause, "unless the yeas and nays on the second and third readings of the bill have been entered on the journal," we shall then have substantially the leading proposition of law upon which my action is founded, for it will then read substantially as follows:

"No conclusive presumption can arise to defeat the Constitutional inhibition upon the passage, by Congress, of an act imposing taxes upon the people, unless the bills originate in the House of Representatives; the object of that provision being to make such an origin a condition precedent to any legislation imposing taxes on the people."

Now, I have, in the 5th and 10th assignments of error, called the Court's attention to three remarkable features of the opinion of the Court of Appeals; and I must recur to them at this point. That Court nowhere in its opinion mentions the Act of February 12, 1901, relating to the Baltimore and Potomac Railroad, but in effect treats the act of the same date relating to the Baltimore and Ohio Railroad as the only act sought to be confirmed or amended by the Union Station Act of February 28, 1903. The validity of the title conferred on the Philadelphia, Baltimore and Washington Company to the money claimed by it under the Act of 1903, considered as a mere contract, depends upon the validity of the grant of the land on the Mall made by the Act of 1901. That

original grant was void because the act in which it was contained, if considereed as a contract, was ultra vires, and hence the consideration upon which the subsequent grant of money was made was spurious. These facts were concealed entirely by the manner in which the case was stated and treated by the Court of Appeals. And since they are exceedingly important facts, if this legislation is to be regarded as a contract, I feel constrained to call the omission to the attention of this Court.

By reference to the 7th assignment of error it will be seen that the Court of Appeals, in the paragraph there quoted from its opinion, misstated the purpose of this suit, which is to procure the annulment of all this legislation, and such other and general relief as may restore to the District its rights under the Act of May 21, 1872, and is not what that Court in its opinion declares it to be.

The Act of 1903 also contains the following provisions:

"TAXATION."

"Sec. 6. That the property owned or occupied by the terminal company, or by the Philadelphia, Baltimore and Washington Railroad Company, or by the Baltimore and Ohio Railroad Company under authority of this Act, or otherwise, together with the improvements that may be put thereon, shall be subject to taxation in the District of Columbia in the same manner and to the same extent as other property in the District, and all tracks and sidings shall be taxed as real estate: Provided, that no assessment, valuation, or tax shall be made, laid, or levied on the stations, terminals, and lines of railroad located, constructed, or maintained under the authority of this Act in excess of that which would or could be lawfully made, laid, or levied if said stations, terminals, and lines of railroad were located, constructed, and maintained without the use of bridges, tunnels, viaducts, retaining walls, or other structures necessary or properly employed to elevate or to depress the same as required by this Act; it being the true intent and meaning hereof that the lines of railroad and terminals here-

by authorized shall be assessed and valued for the purpose of taxation and taxed on the same basis as if the same were not constructed and maintained by means of such bridges, tunnels, viaducts, retaining walls, and other structures: Provided, that such portions of the terminal structure or viaduct as may be constructed and used for storage or like commercial purpose shall be subject to taxation in the same manner as other property in the District of Columbia."

What has been said with regard to section 14 of the Act of 1901, applies with equal propriety to this unjust, socialistic, and unconstitutional provision. And there is another important view to be taken of it.

Under the Act of 1872, the taxes on the depot site and building formed a part of the revenue of the public schools; and, so long as that Act remained in full force and effect, the property occupied by the railroad on the Mall was practically dedicated to educational purposes, and leased indefinitely to the railroad company in consideration of the payment of a rental equivalent to the taxes on the same amount of property owned by private persons and used for private purposes.

We can readily see, therefore, that this endowment of the public school system of the city was the controlling consideration by which the consent of the people to the invasion of the principal park of the city by the railroad company was obtained at the outset.

The District Commissioners in their report to the Senate Committee on the District of Columbia, dated February 6th, 1900, said:

"The present station (on the Mall) was established under authority of an act approved March 23, 1871, by the Board of Aldermen and Common Council of the City of Washington, at a time when the people were supposed to have a voice in the affairs of the District Government." (S. Doc. 220, p. 189.)

In a letter from A. J. Cassatt, President of the Philadelphio, Baltimore and Washington Railroad Company, to Hon.

J. H. Gallinger, "Chairman Senate Conferees on Bill S. 4825," dated January 20, 1903, the following statement is found:

"By the Act of February 12, 1901, the land on the Mall (valued by the representatives of the District, in negotiations leading to the agreement embodied in that act, at $1,275,000) is granted to the Company."

(S. Doc. 220, p. 253.)

It is clear from these statements that the people of the District have been hoodwinked and robbed by this railroad company, which, like The Trojan Horse, was admitted upon the theory that it was bringing gifts. Such corporations always invade communities under the specious guise of benefactors, professing to do no mischief. And, indeed, they do none—except, that gradually gaining a firm lodgment, they quietly build up a special interest in the community, devoted to their particular service; and having accomplished this, they go forward in greater force, and form compacts with other special interests. And from compacts, they go on to attack laws and constitutions; displaying at length unbounded impudence and total disregard for the most sacred rights of men; until they end by overthrowing everything, both in public and in private. Nimirum! haec illa Charybdis!

It was doubtless these principles of corporate audacity, cunning, and rapacity that Goethe had in mind when he said:

"In every place,
Like a disease, an heirloom dread,
They trail their curse from race to race,
And furtively abroad they spread."

The Constitutional provisions relating to the origin of revenue bills and the laying of direct taxes are remedial laws and must be so construed as to repel the mischief and advance the remedy in view.

From this it follows that neither Congress nor any private corporation can do by indirection what it is not authorized to do directly. This proposition expresses a rule of construction which we derive from the English law, where the

same principle was frequently applied in nullifying attempts to evade the mortmain statutes, which were, like the Constitutional provisions respecting the origin of revenue bills and the apportionment of direct taxes, strictly remedial laws. The principle has been applied by this Court in Cummings v. Missouri, 4 Wall., 227; in Ex parte Garland, 4 Wall., 333; and in the Income Tax Cases, 157, U. S., 429; 158 U. S., 601.

In the Cummings case, this Court declared a provision of the Constitution of Missouri void, because it was indirectly in conflict with the remedial provision of the Federal Constitution against ex post facto laws.

In Garland's case, this Court annulled a rule of Court of its own making for the same reason.

In the Income Tax Cases, this Court annulled a system of Federal taxation on incomes because it violated the apportionment clause of the Federal Constitution, by taxing the income from land with a view to burdening that species of property indirectly, without distributing the burden as the Constitution requires.

The principle is admirably illustrated by a decision of Lord Hardwicke, in Attorney-General v. Meyricke, 2 Vesey, Sr., 44, where the question was: whether the mortmain act (9 Geo. II, Ch. 36) prohibited a devise of money to a charity, to be laid out in land. "This," said Lord Hardwicke, "depends on the reason of the law and the construction of its several clauses. The Court ought to put such a construction on this act, being a remedial law, as will most effectually repel the mischief and advance the remedy. And, therefore, if by any means the mischief intended to be prevented by the act may happen, the act ought to be construed to prevent it." * * * The intent was to prevent lands coming by any means into hands where they would be unalienable. Therefore the first prohibition is absolute as to real estate, but leaving men at liberty as to personal. The next circumscribes personal estate and says: 'you shall not give money to be laid out in land'

* * * which clause ought to have a liberal construction, to prevent the mischief."

It is also well illustrated in the case of Attorney-General v. Davies, 9 Vesey, Jr., 535, 541, in which Sir William Grant Master of the Rolls, said: "This case is more immediately within the Statute than Attorney-General v. Day (1 Vesey, Sr., 218), where one of the grounds of refusing to execute the agreement was, that it would be an evasion of the Statute."

In Attorney-General v. Day, supra, decided in 1748, Sir John Strange, Master of the Rolls, said: "There is something in this case, which may lay a great opening to evade the act, although the testator might not have intended any such fraud; for if such a precedent were made, it would be followed by any person who, knowing if he died within a year after the conveyance the act would make it void, gives the exact value thereof in money the same way, and then the one to be laid out in purchase of the other."

Now, in view of these authorities, the Court ought to put such a construction on the two Constitutional provisions in question, as will most effectually repel the mischief and advance the remedy. And if, by any means, the mischief intended to be prevented by those provisions may or could happen by reason of the acts of Congress in question, the Constitutional provisions ought to be construed to prevent it. Their intent was, first, to prevent the Senate from originating taxes; and secondly, to prevent direct taxation for any Federal purpose upon any pretext whatever, unless in proportion to representation in the popular branch of Congress.

There is something in these acts of Congress which may lay a great opening to evade the Constitution; for though Congress may not have intended any wrong; yet if such a precedent were allowed to stand unchallenged, it would be followed by every corporation which might conceive a design to plunder the people in the indirect, evasive, and fraudulent mode pursued by these railroad companies in obtaining this legislation.

There is a manifest difference between a pretext for violating the Constitution and an honest consideration which would support a deed or other contract. And it is the effect and not the pretense, which must govern in determining the constitutionality of an act of Congress.

Now, I have already shown that the Act of 1901 was void because it unmistakably imposed direct taxes in modes forbidden by the Constitution. That Act was ultra vires of Congress; and the railroad company therefore had no right or power to contract with Congress in the mode selected. So that, in the mode selected, the contract entered into between those parties in 1901 was void for want of contracting power in either. But the value of the "rights" claimed to have been given up by the railroad company to the Government as a consideration for the money to be received by it under the Act of 1903, depends entirely on the validity of the prior act of 1901. There was likewise a total absence of power in both or either of the parties to make the contract of 1903. For the former contract could not be ratified by either party, because it could not have been authorized by either. And the "valuable consideration" spoken of by the defendants consists solely of the property rights that were thus fallaciously "granted and conferred" by the Act of 1901.

The Constitution was in force when the statute was passed, and the contracting corporation is presumed to have had knowledge of its provisions. It knew also that it could not receive the benefits and privileges of the statute, if such action would violate the Constitution. And this is true not only where the statute, on its face, is in conflict with the constitutional provision, but also in a case where an attempt to apply the statute to a given state of facts gives rise to a violation of such a provision.

The doctrine of ultra vires applies to the second, as well as to the first of these contracts; for that doctrine, which is a survival of the doctrine laid down by Lord Hardwicke in respect to gifts and devises in evasion of the mortmain laws,

has been construed by American Courts to apply to acts of legislative bodies, done in excess of their powers, as well as to those of private corporations, or of individuals who attempt to deal with corporations lacking capacity to contract in certain modes, or except for certain purposes.

In Cook County v. Industrial School for Girls, 125 Ill., 540, the Court said: "If on the one side a statute directs the County Board to pay money to a school, which appears not on the face of the statute, but from outside proof, to be controlled by a church; and if on the other side, the Constitution, in a self-executing prohibition directs the County Board not to pay money to such a school; which direction is to be followed? We answer unhesitatingly the latter. When the Constitution says "you must not pay" it must be obeyed in preference to a statute which says "you must pay." The Constitution forbids the county to pay—the defense is grounded more upon the Constitutional prohibition as controlling the action of the defendant (the county) than upon such want of power, or abuse of power, as affects the plaintiff in the suit (125 Ill., p. 564).

"Suppose that a corporation, organized for a lawful purpose, maintains and operates a gambling institution and brings suit upon a note payable to its own order, and given to it for a lawful debt. The maker of the note cannot defend on the ground that the plaintiff is perverting its power by running a gambling establishment. That matter must be inquired into by a writ of quo warranto or scire facias. But if the note in question had been given for a gambling debt, that fact could be set up as a defense, because the statute makes such a note absolutely void. (Id. pp. 564-5.)

"If the contract sued upon is a contract by the county to pay money out of the public funds in aid of a sectarian purpose, it is absolutely void; for the Constitutional prohibition against paying money is equally a prohibition against a contract to pay money." (Id. p. 505.)

Is it not eaqually true that a Constitutional prohibition against laying taxes except according to a certain mode, is also a prohibition against a contract involving a violation of the prescribed mode?

Again, in the case of Farmer v. St. Paul, 67 N. W. Rep., 990, Chief Justice Start, reasoning upon the same general principles, condemned a contract with the House of the Good Shepherd, in the form of an ordinance of the City Council of St. Paul.

"Clearly," said he, "this ordinance is in excess of the authority conferred upon the city, and it is void for that reason. The only work-house the city was authorized to establish was a public work-house, which should be governed and controlled by municipal authority. This ordinance does not establish such a work-house. It is void, and all commitments of female prisoners to the House of the Good Shepherd by the city courts are void.

"It necessarily follows that any contracts on the part of the city, express or implied, for the future detention and support of prisoners in an institution to which such prisoners cannot be legally committed, are illegal."

Undoubtedly, the same reasoning applies here.

In Washingtonian Home v. Chicago, 157 Ill. 414, it was insisted in the argument that since the city had paid over the fund in dispute quarterly for a period of over twenty years, the payment having been recognized each year in the annual appropriation ordinances of the city; and that since the city had received substantial benefit each year, it was bound by its ratification of the act, and was therefore estopped from denying its constitutionality. But the Court said (p. 428): "The fact that the officers of the city for twenty-two years, paid over to the Home, annually, a portion of the revenue of the city in violation of law, could not work an estoppel on the city. Nor did the fact that the City Council annually, in its appropriation ordinances, recognized and made provision for the payment of the fund to the Home estop the city from

refusing to make payment at any time it might elect to do so. The revenues of the city of Chicago, arising from licenses, from taxation and from all other sources, are owned by the city, and held by it in trust to be used for corporation purposes which are lawful; and cannot be diverted by the officers of the city, or by the City Council, to any person they may think entitled to the same. Such revenues can only be paid out, or appropriated, by the City Council or its officers in a mainner and for purposes authorized by law. Where the lawful power does not exist, the payment is unauthorized and void; and the city will lose no rights where the money has been unlawfully paid out by its officers."

Compare this reasoning with that of Chief Justice Marshall in Cohens v. Va., and Loughborough v. Blake, and say whether it does or does not fit the present case like a glove? The fact that we live in the District of Columbia makes no difference in the application of this principle.

In the case of Curry v. District of Columbia, known as the Cab Case (14 App. Cases, D. C., 423), Mr. Justice Morris, delivering the opinion of the Court of Appeals, said:

"The power of Congress in the District of Columbia as elsewhere throughout the Federal Union, is distinctly limited by all the express guarantees of individual right contained in the Federal Constitution. No more in the District of Columbia than elsewhere within the United States could the legislature of the Union pass a bill of attainder, or an ex post facto law, or dispense with trial by jury, or establish a religion, or authorize unreasonable searches. All the general limitations imposed by the Constitution upon its authority are as applicable in the District of Columbia as in any other part of the United States. And not only are these express limitations applicable, but in the language of Mr. Justice Miller, all the 'implied limitations which grow out of the nature of all free governments' are equally applicable. The 'exclusive' power of legislation over this District, which is vested in Congress by the Constitution, must be assumed to extend only to lawful

subjects of legislation; and invasions of those fundamental individual rights which lie at the foundation of the social compact, and for the mantenance of which free governments exist, are not lawful subjects of legislation.

"We do not ignore the argument of convenience that has been urged upon us, to the effect that the cab or hack service heretofore rendered in this District has been, as alleged, quite inefficient; that the service rendered by the railroad company is of a very superior character, and that it is within the scope of the police power of the State to promote the comfort and convenience of the people, as well as the public health, the public safety, the public morals, or the general good order of society, by the grant of exclusive privileges. We can readily believe that the railroad company will render most efficient and satisfactory service in the premises. It may not be improper to take judicial notice of the fact that whatever service the Pennsylvania Railroad Company, which, it is conceded, dominates and controls the other two railroad companies that have been mentioned, has heretofore undertaken to render to the public, it has performed such service with eminent satisfaction, and we are therefore justified in assuming that the service proposed to be rendered in this case under the same auspices will likewise be rendered with entire satisfaction to the public. But the question here is not one of convenience to the Railroad Company or its patrons, nor one of better service to the public, but one of equality of right before the law. The public convenience is not to be subserved by the destruction of private right or the subversion of a fundamental principle of all free government." (14 A pp. Cases, D. C., 445-8.)

Language more appropriate to the present case could scarcely be conceived.

This Court has applied this doctrine of ultra vires to contracts by and between private corporations in numerous cases.

In Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, Justice Gray, of this Court, said:

"A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined by the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

When the defendant corporations urge the Court to sustain this legislation as a contract because they have done so much work and spent so much money in persuance of it, I merely point to these words of this Court, spoken by Justice Gray.

In the case of De la Vergne Refrigerating Machine Company v. German Savings Institution, 175 U. S. 60, Mr. Justice Brown said:

"Whatever doubts might have been once entertained as to the power of corporations to set up the defense of ultra vires, to defeat a recovery upon an executed contract, the rule is now well settled, at least in this Court, that where the action is brought upon the illegal contract, it is a good defense that the corporation was prohibited by statute from entering into such contract." (175 U. S., 71, 72.)

Here both parties were prohibited by the Constitution, the supreme law, from entering into a contract involving taxation in the mode adopted.

In that case, the question of ultra vires had not been raised or called to the attention of the Circuit Court at all, but was for the first time called to the attention of the Circuit Court of Appeals, as preliminarily noted by Justice Brown.

Notwithstanding that fact, this Court treated it as "the main defense," or question at issue. (175 U. S., 69-72.)

In Ward v. Joslin (186 U. S., 142, 151-152), Chief Justice Fuller said:

"The rule in this Court is that a contract made by a corporation beyond the scope of its powers, express or implied, cannot be enforced."

In that case the Court allowed the plaintiff to go behind a judgment previously rendered against him by default, in order to show the invalidity of the contract in issue. Chief Justice Fuller said:

"It must be remembered that in the case before us the right of action accrued, and the action was accordingly brought, 'by virtue of the Constitution and statutes of the State of Kansas in such cases made and provided.' We think it was not error to permit the stockholder to go behind the judgment so far as to show, or, at all events, to insist, since the judgment record introduced below disclosed the invalidity of the guaranties, that he was not liable under that constitution and those laws." (186 U. S., 152.) See also Brownsville v. League, 129 U. S., 493; Schraeder v. Manufacturing Co., 133 U. S., 67.

Numerous cases involving the doctrine of ultra vires were collected and reviewed in 1891, by Justice Gray, in Central Transportation Company v. Pullman's Palace Car Company supra. In that case Mr. Wayne MacVeagh, who signs the Appellee's brief in this case, was counsel for the defendant in error, and raised the point that the contract there in issue was ultra vires. The case hinged on that point. Justice Gray, delivering the opinion of the Court, said:

"Upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature, and those powers only; and upon the invalidity of any contract made beyond those powers; there is no occasion to refer to decisions of other courts; because the judgments of this Court, especially those delivered within the last twelve years by the

late Justice Miller, afford satisfactory guides and ample illustrations." (139 U. S., 40.)

The cases reviewed by Justice Gray in that case are as follows:

York & Maryland Railroad v. Winans, 17 Howard, 30, 39;

Pearce v. Madison & Indianapolis Railroad, 21 Howard, 441, 443;

Zabriskie v. Cleveland, etc., Railroad Company, 23 Howard, 381, 398;

Thomas v. Railroad Company, 101 U. S., 71, 80, 82, 86;

Branch v. Jessup, 106 U. S., 468; 478, 479;

Pennsylvania Railroad v. St. Louis Railroad, 118 U. S., 290, 309, 312, 630;

Willamette County v. Bank of British Columbia, 119 U. S., 191;

Green Bay & Minnesota Railroad Company v. Union Steamboat Company, 119 U. S., 191;

Pittsburg Railway v. Keokuk and Hamilton Bridge, 131 U. S., 371, 384;

Oregon Railway Company v. Oregonian Railway, 130 U. S., 1, 26, 27, 30, 32 34 35.

The doctrine has been vigorously applied also to the acts of public corporations, both states and municipalities, by this Court. In Loan Association v. Topeka, 20 Wallace, 655, Justice Miller, delivering the opinion of the Court, said:

"If these (municipal corporations) have a fund or other property out of which they can pay the debts which they contract without resort to taxation, it may be within the power of the legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good.* * * But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully lay, and that all contracts creating debts to

be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation.

"It follows that in this class of cases the right to contract must be limited by the right to tax; and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. * * * The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose." (20 Wallace, 659-660.)

The recent case of Bank of San Francisco v. Dodge, Assessor, etc., decided by this Court, February 27, 1905 (No. 44—October Term, 1904), affords another instance. In that case the bank sued to restrain the enforcement of State, county, and city taxes, levied under a State law for the year 1900 upon shares of its stock, on the ground that the taxation there involved was not permissible under the Federal law. The Circuit Court dismissed the bill, and the Circuit Court of Appeals affirmed that decree. But this Court reversed the decrees of both the inferior courts. Justice White, delivering the opinion of the Court, said:

"The States may not pursue the method permitted by the Act of Congress, of taxing shares of stock in national banks, unless the same method is employed as to stock of State banks and other moneyed corporations." (page 3.)

"Our conclusion, therefore, does not deny the power of the State of California to assess shares of stock in national banks, provided the method adopted does not produce the discrimination prohibited by the Act of Congress." (page 10.)

Now, applying this decision to the case at bar, I do not deny the power of Congress to tax property in this District for a governmental purpose, provided the method be the constitutional method of legislation which requires that all bills for raising revenue shall originate in the House of Representatves. But I contend that the legislation in question is ultra vires of Congress, because it originated in the Senate,

and because the tax authorized by it is not for a local or even a governmental purpose. The method and the purpose are both prohibited and consequently, as contracts, these acts are void. Wilkes County v. Coler, supra, is a recent instance of the application of this doctrine to State tax legislation

As to "contractual obligations," then, how can any obligation which a government or corporation has no constitutional right to incur, be a contractual obligation? I deny the existence of any such obligation in this case. I contend that the doctrine of ultra vires applies to contracts such as those set up here, as well as to ordinary contracts between private or quasi public corporations.

There being no valid contractual obligation in this case, then, what follows? It is certain that unless these railroads were actually adopted as instruments of the Government, and owned by it, their uses would not be such as to justify taxation for their benefit, or the exemption of their property from taxation. And it is equally certain that they have not been so adopted. The case of Thomson v. Pacific Railroad (9 Wall. 579) sustains this view. The question there was, "whether the property of the railway company described in the bill was subject to the tax which the State of Kansas authorized to be levied on all other property, not specially exempted, for State, county, and municipal purposes." (p. 582.)

Attorney General Hoar, in an able argument, maintained the right of the Union Pacific Railroad and its branches to exemption from taxation by the State of Kansas, on the ground that that railroad was a governmental instrument, and its uses public uses. He said:

"It is one and a part of a system of roads constructed under the direction and authority of Congress, for the uses and purposes of the United States, in the exercise of its power to provide for the common defence and general welfare of the United States, to regulate commerce among the several States, to establish post offices and post roads, to raise

and support armies, and to suppress insurrections and repel invasions." (p. 583.)

Chief Justice Chase delivered the opinion of the court, from which I quote a few pertinent paragraphs: The Chief Justice said:

"It is earnestly insisted that the right of exemption arises from the relations of the road to the General Government. It is urged that the aids granted by Congress to the road, were granted in the exercise of its constitutional powers to regulate commerce, to establish post offices and post roads, to raise and support armies, and to suppress insurrection and repel invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency a percentage of income, the road was adopted as an instrument of the Government." (p. 589.)

"That such taxes cannot be imposed on the operations of the Government is a proposition which needs no argument to support it; and the same reasoning will apply to the instruments of the Government." (p. 589.)

And, in conclusion, he said:

"We are unable to find in the Constitution any warrant for the exemption from taxation claimed by the complainants." (p. 592.)

If this means anything it means that railroads are not per se governmental instruments, and if that be so, their uses will not support taxation—a principle which has since been fully established by decisions of the most eminent judges of the State Courts, such as Cooley and Dillon, whose opinions were cited with approval by this Court in Loan Association v. Topeka.

As to their tangible property, then, railroads are strictly private institutions; and even as to their franchises, the same is true, notwithstanding the fact that they are affected with a public use so far as to bring them under the control of the police power, or power "to regulate commerce." That the franchises of railroad companies are private property and

subject, therefore, to taxation, was decided by this Court in the New York Franchise Tax Cases, May 29, 1905. The franchises conferred by this legislation have been estimated to be worth $50,000,000. On this no taxes are to be levied under these acts. This gift and this exemption are in themselves grave offences against common justice and public policy.

On this branch of the case I rely also upon five other cases, in one of which the opinion of the Court was delivered by Judge Cooley, in another by Judge Dillon, and in another by Justice Miller.

The People v. Town of Salem (4 Am. Reports, 400; 20 Mich., 452) was an application for a mandamus by the relator, the Detroit and Howell Railroad Company, to compel the town of Salem, Michigan, to issue bonds in aid of its railroad. The issue was tried at circuit, and a verdict was rendered in favor of the relator. The town appealed. The appellant contended, among other things, that the Detroit and Howell Railroad Company was a private corporation; that local taxation could not be imposed except for local purposes; and that there is no power in the State to authorize taxation for private purposes.

Judge Cooley delivered the opinion of the Court, in which Chief Justice Campbell and Justice Christiancy concurred. Concerning the general nature of the power of taxation, Judge Cooley said:

"In order to render valid a burden imposed by the legislature under an exercise of the power of taxation the following requisites must appear:

"1. It must be imposed for a public, and not for a mere private purpose. Taxation is a mode of raising revenue for public purposes only, and, as is said in some of the cases, when it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation, and becomes plunder. (Citing numerous cases.)

"2. The tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. A State burden is not to be imposed upon any territory smaller than the whole State, nor a county burden upon any territory smaller or greater than the county. Equality in the imposition of the burden is of the very essence of the power itself, and, though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable. (20 Mich 474.)

"The case before us is that of a private corporation demanding a gratuity which has been voted to it in township meeting, upon the assumption that its business operations and facilities will incidentally benefit the township. I do not find that the meeting possessed any inherent authority to pass such a vote, or that such authority could have been conferred upon it. The legislature could not confer upon the majority then convened a jurisdiction to measure for the minority the demands upon their gratitude and liberality. Individuals, as such, must make their own donations, and decide for themselves how far any proposed enterprise of other individuals can properly and justly, in view of the benefits they may receive therefrom, demand their aid and assistance.

"It is not in the power of the State, in my opinion, under the name of a bounty, or under any other cover or subterfuge, to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it. A bounty law, of which this is the real nature, is void, whatever may be the pretense on which it may be enacted * * * Any single individual has the right to insist that the public does not own or control his property for the purpose of donations." (20 Mich. 486.)

I commend these words to the earnest and prayerful consideration of counsel on the other side. They seem to me to strike home.

Two points are very clearly brought out by Judge Cooley in his opinion in People v. Town of Salem, against the validity of such acts as those now under consideration. The question then being, as we have seen, whether the township of Salem could be taxed in order to aid the Detroit and Howell Railroad Company in building their railroad. Judge Cooley said:

"If the township of Salem can be required to tax itself in aid of the Detroit and Howell Railroad Company, it must be either, first, on the ground of the incidental local benefit in the enhancement of values; or, second, in consideration of the facilities which the road is to afford to the township for travel and business. The first ground is wholly inadmissible. The incidental benefit which any enterprise may bring to the public has never been recognized as sufficient of itself to bring the object within the sphere of taxation. In the case of streets and similar public improvements, the benefits received by the town have sometimes been accepted as a proper basis on which to apportion the burden; but in all such cases the power to tax is unquestionable, irrespective of benefits. The question in such cases has not been the right to tax, but the proper basis of apportionment where the right was conceded.

"The second ground is more plausible. To state the case in the form of a contract, it would stand thus: The township is to give or loan to the railroad company five per centum of its assessed valuation. In consideration whereof, the railroad company agree to construct and operate their road, and to hold themselves ready at all times to give to the people of the township the facilities of travel and trade upon it, provided they will pay for such facilities the same rates which are charged to all other persons. In other words, the company agree, on being secured the sum mentioned, to take upon themselves the business of common carriers within the limits of the township. If this consideration is sufficient in the case of common carriers, it must be sufficient also in the

case of any other employment. There is nothing in the business of carrying goods and passengers which gives the person who conducts it a claim upon the public different in nature from that of the manufacturer or merchant. Neither is it of the least importance in a legal point of view that the carrier is commonly a corporation."

It would be hard to conceive language more directly and forcibly applicable to the case at bar. How can it be answered, except by a resort to sophistry?

Judge Christiancy said:

"I am satisfied that incidental public benefits cannot be made the basis of the right to raise taxes from the people, to be paid or loaned to a railroad corporation, or to other private parties, for their own use, and without securing to the local public any greater interest in, or benefit from, or control over, the work or enterprise, than would have accrued from it, had the same been completed or carried on by private parties." (20 Mich., 500.)

And further on, he shows that the theory of incidental benefits is directly contrary to the fundamental maxim of the law of corporations, as well as to the maxims governing taxation and contracts. He said:

"A little reflection, and a recurrence to the fundamental principles upon which corporations are created, will readily demonstrate that this theory (of incidental benefits) is unsound upon any legal principle—a mere legal fallacy, no more just than sound. These incidental benefits are the only consideration or compensation which corporations pay, or which the people receive, for the large powers and exclusive privileges bestowed upon corporations beyond those enjoyed by citizens of the State generally. These incidental benefits constitute the sole inducement and only possible justification to the government for the grant of such important and exclusive privileges. This is the fundamental idea upon which alone corporations can be created at all. The corporation, therefore, in the reception and enjoyment of these large pow-

ers and privileges, upon all legal and constitutional principles, must be considered as having already received a full equivalent and compensation for these same incidental benefits which are now again urged as the basis of new and further compensation—as the foundation for the imposition of direct taxes for the increase of their funds—though they could never have had an existence, as corporations, but for the virtual promise and reasonable expectation that such incidental benefits (to the public) were to be enjoyed by the people without further compensation." (20 Mich., 501, 502.)

Is there any sound reason why this principle should not apply in this case? Surely, the fact that this District is not a State cannot alter the case.

Chief Justice Campbell used this language:

"It has been said to be too clear for argument that it would be usurpation, and not legislation, to take the property of A and give it to B. It must, on the same ground be equally illegal to tax A for the benefit of B. The amount of property taken against his will cannot make any difference in the principle. Neither can it make the wrong any the less, that he has companions in misery. Taxation for private purposes is no more legal than robbery for private purposes. * * * And where an enterprise is conducted by private persons for their own private benefit, the public authorities having no control over the expenditure and no share in the profits, it is a private enterprise, and not a public one, whether large or small, and whether profitable or unprofitable. For the expenditure of public money, the Constitution and laws provide public officers, and put them under adequate control and security. The money of the people belongs in the custody of the agents of the people. Governments cannot delegate public responsibilities to private and irresponsible hands." (20 Mich., 495, 496.)

Now, if this be true—and I venture to say that no lawyer will deny it—how can the legislation in controversy be upheld?

In Sweet v. Hulbert (51 Barber, N. Y., 312), the Supreme Court of New York decided that an act of the legislature of that State, passed March 27, 1868, authorizing the town of Saratoga to issue bonds to aid in the construction of a railroad from the village of Mechanicsville to intersect the Glen Falls railroad, was unconstitutional, because it assumed to take the money of the tax-payers to be donated to a private railroad corporation.

Judge James, delivering that opinion, among other things, said:

"This act is different, in the particular of authorizing the money to be 'donated,' when raised, from that numerous brood of statutes which has preceded it, authorizing towns to bond themselves, in aid of real or imaginary public improvements. In all other acts, stocks, or some pretended equivalent, is contemplated as a consideration for the bonds to be issued. But this act authorizes a donation, pure and simple; in other words, the legislature has assumed to authorize, through the instrumentality of commissioners and the taxing power, the taking of a certain amount of the property of one corporation and donating it to another. If this can be done, it is legal robbery; less respectable than highway robbery, in this, that the perpetrator of the latter assumes the danger and infamy of the act, while this act has the shield of legislative irresponsibility."

"The act under consideration," he said, "is contrary to the spirit of the Constitution, if not a violation of its letter. That instrument declares that 'no person shall be deprived of his property without due process of law.' Legislative enactment is not due process of law. 'Nor shall private property be taken for public use without just compensation.' The use specified by this act is not a public use, but a donation to a private company; the pretense is to aid in the construction of a work which the public may use by paying for the privilege; still it is private property. The act contemplates no compensation for this money. Therefore taking the property of the

citizen to pay these bonds would be taking it for a private, not public, use, and without compensation; and none the less so because taken through the instrumentality of the taxing power, unless within the legitimate scope and meaning of the taxing power, as I think it was not.

"Every statute authorizing the bonding of towns to aid in the construction of railroads, etc., which has as yet been upheld by the courts, contemplated some direct equivalent, in stock or otherwise, before issuing and delivering the bonds or their proceeds. In this act no equivalent, real or imaginary, is contemplated—it does not devote the money to the construction of the railroad through public officers devoted to the duty, but donates it to a company, and then declares it shall be employed and used in the construction of a railroad. The gift is positive, the use is directory.

"The donation provided by this act is not for a public improvement; the tax is not authorized as such. To that end an appropriation should be directly to the object; and the act should direct the amount to be levied, and when. This act simply authorizes the town, on certain conditions, to issue its bonds, give away the proceeds, and then tax the citizens to pay the principal and interest. To call this a legitimate exercise of the taxing power, or within the scope and meaning of such power, would be an abuse of terms."

A better description of the character of the legislation assailed by myself in this case, could not have made if it had been the immediate subject under consideration in that case. And the following comment, added by Judge James, is as appropriate in this case as in that.

"The citizen does not hold his property by so slight a tenure that it can be taken from him by the legislature for any and all purposes, either under the guise and power of taxation, or color or pretense of exercising any of the other recognized powers of the government. All power in the legislature over the property of the citizen, is derived from the people, and is either directly conferred by the terms of the

constitution, or impliedly granted, as incidental to some power expressly given, or results from the necessities of government, and exists as an incident to government.' Authorizing a town through its officers, or by commissioners, to donate its property to a private, or quasi public corporation, is not among such express or implied powers.

"The property of the citizen cannot be taken from him without his consent, except by due process of law, or by eminent domain, or by taxation. Against every other mode he is protected.

"The act under consideration does not assume to take the money of the tax-payers by due process of the law, nor in virtue of eminent domain; and it does not come within the legitimate scope and purpose of the taxing power of the government; it therefore follows that in passing said act the legislature exceeded its powers; that the act was unauthorized; and is without validity or force."

The third case in point came up in Iowa in 1869, and is known as Hanson v. Vernon (27 Iowa, 28). In that case Sweet v. Hulbert was cited and approved; the principles of eminent domain, taxation, and constitutional limitations thoroughly examined.

The legislature of Iowa had passed a law which was, in principle, precisely like the Union Station act. Judge Dillon, who was then Chief Justice of the Supreme Court of Iowa, after demonstrating the unconstitutionality of such a law upon principle and authority, reviewed the pretexts upon which it had been defended, as follows:

1. "It is argued that taxes authorized by the law under consideration, are levied and collected for public purposes because the right of eminent domain can be exercised in favor of railroad companies. There is plausibility enough in this suggestion to justify an answer to it.

"It overlooks the fact that the taxing power and the right of eminent domain are, though in some respects kindred, essentially different.

"Property may be taken under the taxing power without any direct compensation whatever, the foundation of this power being, as above shown, in an absolute political necessity, the compensation of the tax-payer being merely theoretical and incidental. Property, by virtue of the power of eminent domain, can only be taken when direct and full compensation is made in money, and can only be taken to the limited extent required by the object in favor of which it is exercised. The leading case on this subject is The People v. Brooklyn (4 Comst. 423, 425), where the distinguishing attributes of the two powers are very clearly stated by Justice Ruggles.

"The two powers being different, it does not follow that a tax can be levied for the benefit of any private enterprise, though the enterprise be one which would justify the exercise of the right of eminent domain.

"Because the legislature may take enough of A.'s land to enable a railroad company to build its road, provided A. be paid in money the full value of the land, and any additional damage that the taking may do him, it does not follow that A. can be taxed to build the road without receiving or being entitled to any return for the money he is thus compelled to pay. The cases are obviously different.

"The difference may be exemplified by an example or two, derived from actual adjudications.

"Under the right of eminent domain, it has been held by the Supreme Court of Massachusetts, that, on making compensation to the owner, land may be compulsorily taken for the establishment of a great mill power for manufacturing purposes. It has also been held that land may be thus taken for a public grist-mill and for mill-dams and the like. We have also statutes authorizing the condemnation of property for bridges and works of internal improvement, and authorizing mill-dam owners, on paying damages, to flood the supra-riparian proprietors.

"Conceding for the argument, that these and similar decisions and statutes are sustainable, will it be contended that

citizens can be taxed, and against their consent compelled, to pay money to a man, or company, or private corporation, proposing to erect 'a great mill power for manufacturing purposes' or "a public grist-mill,' or to reimburse mill-owners the amount which they will have to pay under the ad quod damnum act?

"If this is not claimed, then the argument I am answering, viz., that there is a right to tax where there is a right to exercise the power of eminent domain, is shown to be unsound. If this is claimed, then the startling and dangerous consequences to which the proposition leads equally demonstrate its unsoundness.

"Our statute authorizes any person or corporation designing to construct a canal, or a railroad, or a turnpike, graded, macadamized or plank road, or a bridge, as a work of public utility, although for private profit, to take such reasonable amount of private real estate as may be requisite for a right of way not exceeding one hundred feet wide, upon paying therefor, etc. Can the legislature tax the citizen and compel him to assist any person or corporation designing to construct such works for private profit? Who is bold enough to claim it? I deny that it can be done. The property that can be taken by the exercise of the right of eminent domain is restricted to the actual amount required to execute the undertaking, and is generally limited to one hundred feet in width, and full value in money must be paid. This itself is a check against the abuse of the power. But the amount of tax that may be levied is unlimited, and no return or compensation to the tax-payer is contemplated. Indeed, the very object of the Act of 1868 is to get the money of the property owner without being obliged to make any compensation to him therefor."

That legislation and this were clearly coins out of the same nugget and the same moulds. And the law of the one case is equally the law of the other.

2. "Again," said Judge Dillon, "it is urged in support of the Act of 1868 that railways are simply improved highways,

and that taxes in aid of their construction stand upon the same principle as ordinary road taxes; that since the State might itself build a railroad and pay for it out of the public revenues raised by taxation, so it may, if it chooses, authorize such taxes in aid of private railway corporations. This argument is unsound. The ordinary highway is the common property of all, for the common use of all, and the jurisdiction and control of it on the part of the legislature as the representative of the public, is absolute and unlimited. In all of these respects a railway is different. That because the State may itself build a railway and own it, it is a non sequiter to suppose it can authorize the citizen to be taxed for the benefit of a private corporation organized for pecuniary profit.

"Let me illustrate. The State may levy a tax to support common schools. Can it levy a tax, or authorize a majority in a town or city to vote a tax to support the private school kept by Mr. A. or B. I think not. Other illustrations will readily suggest themselves; and I will say no more in response to this argument, except to refer to the answer it received in the Wapello County Case.

3. "Some argument in favor of the validity of the act under consideration may, it has been suggested, be drawn from the fact that courts have sustained laws authorizing the giving of bounties to soldiers volunteering to defend the country in time of actual war, and the levying of taxes to pay such bounties." I believe, said the Judge, on this point, "that the difference between such a case and that of a compulsory donation to a private railway company is so distinctly pronounced and obvious, that I may safely leave the argument to answer itself.

4. "The legislation under consideration is," he added, "to be distinguished, on the principle involved, from the ordinary case of municipal assessments for local public improvements, such as sidewalks, etc., and is not necessarily identical with that in which the legislature has authorized some specific public work, such as draining marshy lands, to

be done through the intervention of a company, and the expense assessed upon the lands benefited.

5. "Nor will a denial of the constitutionality of the Act of 1868," he remarked, "be equivalent to holding that the legislature could not, if it deemed it for the public good, and complied with the requirements of the Constitution, give public aid to local or private objects.

"The legislation in question," he declared, "cannot be sustained. It is the duty of a judge to look at this statute in the light of the principle which gives to it its distnctive character. The Court cannot uphold the tax in question without sanctioning the following principle, viz.: That it is competent for the legislature, because of the incidental advantage which would result to the community from the carrying out of the objects of a voluntary private railway corporation, organized for pecuniary profit, to authorize a tax to be levied on the citizen and his property, to be given as a bounty to such private corporation, to be used in aid of its undertaking, without any pecuniary compensation to the tax-payer being contemplated or provided. Such a doctrine would unsettle the foundation of private rights. If," said he, "because of the incidental advantage to the community resulting from the construction of its road, and the pursuit of its business, by a railroad company, the citizen and his property may be specially taxed to aid such company to execute its undertaking, who can define the logical boundaries of this doctrine Who can fix the limits to this kind of taxation? Who can foresee the consequences of such a decision? Railroad enterprises are not the only ones that would result in a consequential benefit to the public. On the contrary, political economists tell us, and our reason and observation confirm it, that agriculture, commerce, the mechanic arts, in a word, every department of labor and every industrial pursuit, promotes the public good by advancing the public prosperity. Manufactures of various kinds are scarcely less needed in Iowa to-day, than railroads. As in the case of railroads, it requires large capi-

tal to build and operate them. Can the legislature authorize a tax as a bounty or gratuity to private persons or corporations proposing to erect manufactories? That it could authorize this, or any like taxation, could not be denied, were the present legislation sustainable. One of the counsel has drawn, in eloquent terms, a graphic picture of the disastrous effects, in retarding the growth and development of the State, of holding the act under consideration to be invalid. As such considerations have no place in the judicial determination of the question, except to superinduce greater care and more sedate deliberation, I dismiss them, with an expression of my disbelief in the dangers which are apprehended, of my skepticism in the healthfulness of an artificial growth caused by the unnatural stimulus of public taxation in favor of private enterprises, and of my firm conviction that any benefits resulting from a different holding would be dearly purchased at the expense of the fundamental rights of the citizen. This opening once made in the barriers which the Constitution has erected to protect private property, who is so wise as to foretell what troops of foes may not hereafter enter at the same breach? And who, in such an event, will be strong enough to prevent it? My convictions as to the illegality of the law are clear and decided, however imperfectly I may have expressed and vindicated the grounds on which they rest."
Iowa, pp. 54-60.)

I have quoted at great length from Judge Dillon's opinion, because it squarely meets and overthrows objections to my own position in this present case. I place great stress upon it, and beg the Court to consider it thoroughly.

In the case of Whiting v. the Sheboygan and Fond du Lac Railroad Company (25 Wis., 167), Sweet v. Hulbert and Hanson v. Vernon were cited and approved, and were, moreover, declared to be the only cases where the particular question involved had been decided. Chief Justice Dixon, delivering the opinion of the Court, held: First, that a tax for a private purpose is invalid; second, that in the case of a rail-

road owned by a private corporation, the municipality not becoming a stockholder in the company, an assessment upon the property of citizens in the nature of a tax for the purpose of aiding the objects of the company is not a legitimate exercise of the taxing power; third, that in the case of such a company, in whose favor the right of eminent domain may be exercised, the public use consists, not in consequential benefits to the public, but in the right of the public to the carriage of persons and property upon tender of a proper consideration, and in the power of the State to control the franchise and limit the tolls; fourth, that such a qualified and limited public use (called quasi-public) will not support taxation for the purpose of raising money to be donated to such a corporation.

He carefully distinguished this class of cases from those in which the courts have upheld taxes where a city, town, or county became a part owner of the road to the extent of stock taken; the work being one in which the public might have engaged as the sole owner, and paid for entirely out of the public funds. In such cases it has been considered that there was no valid objection to its becoming a part owner thereof as a stockholder in a private corporation, which had undertaken to do the same work, but in no case has it been held that the benefit incidentally arising to the public is sufficient to sustain a tax, where the county, city, or town owns no stock in the corporation.

It was contended by Matt H. Carpenter, counsel for the Railroad Company, that the property in the hands of such companies was public property; and that, therefore, such taxation was justifiable.

"This proposition," the court said, "requires not much discussion. The contrary has been the settled law both in England and this country ever since these and kindred corporations have had an existence; and for the earlier authorities on this we refer to the brief of counsel in Charles River Bridge v. Warren Bridge (11 Peters, 433). Not only the property in the road, rolling stock, fixtures, and all buildings and ap-

purtenances, is recognized and protected as the private property of the corporation, but also the franchise itself." And on this point the Court cited West River Bridge Company v. Dix (6 Howard, 566).

The case of Thomson v. Pacific Railroad and the New York Franchise Tax Case, supra, are to the same effect.

Again, it was contended by Mr. Carpenter, that the public use which justifies the exercise of the power of eminent domain, consists in the general benefits and advantages accruing to the public at large from the creation and operation of works of internal improvement. But this the Court positively denied; and it also denied the contention that in any case where the power of eminent domain can be exercised, the power of taxation may likewise be exercised.

This is an exceedingly important consideration in the case at bar, because here both taxation and eminent domain have been brought into play for the same purpose.

It was further argued by Mr. Carpenter in support of the tax laid in that case, that a writ of mandamus would lie at the instance of the government to compel the company to build and operate its road and that whenever the public have such an interest, taxes may be levied. This the Court denied, because it had been well settled that a mandamus would not lie in such a case.

Finally, it was contended by Mr. Carpenter that, since taxes had been sustained where counties, cities, and towns had subscribed for stock in railroad companies, it followed that taxes might be legitimately imposed in aid of the purposes of such companies, although the public did not subscribe for stock in them. In answer to this the Court said: "We have seen that whether the public own the property enters very materially into the consideration whether the purpose is public or not. We all know, too, that the position of one who gives as a gratuity to a corporation is very different from that of a stockholder in it. To the extent of the stock subscribed the municipality owns the road; and to that extent

it may be said to be public property. And, besides, the correctness of the line of decisions upholding municipal subscriptions has been questioned by very high authority."

These cases were cited and approved in Loan Association v. Topeka, 20 Wall., 655, where it was held by this Court, that the right of taxation can only be used in aid of a public object, an object which is within the purpose for which governments are established.

That it cannot, therefore, be exercised in aid of enterprises strictly private, for the benefit of individuals, even though in a remote or collateral way the local public may be benefited thereby.

That though the line which distinguishes a public use for which taxes may be assessed from a private use for which they may not, is not always easy to discern, yet it is the duty of the courts, when the case falls clearly within the latter class, to interpose when properly called on for the protection of the rights of the citizen and aid to prevent his private property from being unlawfully appropriated to the use of others.

That a statute which authorizes a town to issue its bonds in aid of the manufacturing enterprises of individuals is void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profit of others, and not for a public use, in the proper sense of that term; and

That in a suit brought on such bonds or the interest coupons attached thereon, they are properly declared void.

The difference between subscribing for stock in a railroad company, and granting such nude aids as those involved here, is material in this present case. That difference was thus referred to by Justice Miller in Loan Association v. Topeka. On this point he said:

"The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every State in the Union. It has been thoroughly discussed, and is still the subject of discussion in those courts.

It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the States, unless restricted by some special provisions of their constitutions, may c onfer upon those municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations—also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether." (20 Wall., 669.)

It should not be forgotten that neither this District nor the United States secured any stock or other property interest in return for the grants of money and franchises, and lands in this case.

The taxing power, even when exercised in the manner prescribed as to the initiation of revenue bills and the apportionment of direct taxes, is restricted to public governmental purposes only. The "debts of the United States" and the "common defense and general welfare of the United States" import public debts, public defense, and public welfare. They do not import any private object whatever, nor any quasi public object. This point cannot be successfully met by claiming that in this particular case Congress derives its authority to tax, not from the substantive power granted for that purpose, but as an incident to some constructive power, such as its police power over the District of Columbia. The decision in the Curry case, supra, forbids that view. Nor is the police power even mentioned, eo nomine, anywhere in the Constitution. It is not a substantive power, but is merely incidental to the grant of exclusive legislative power over this District and places belonging to the United States as a proprietor. It is, in effect, a municipal power; and as such, its exercise by Congress is subject to the general principles of municipal law, in addition to the general limitations placed

by the Constitution of the United States upon the authority of Congress.

In spite of all this, however, the defendants say:

"We think the Court would be entirely justified in refusing to declare the acts unconstitutional, even were defects in the laws or irregularities in their enactment clearly pointed out." (Appellees' Brief in Ct. App. p. 15.)

They ask you, in effect, to say that this legislation, though it be not law—though it be even fatally defective—shall constitute a rule as operative as if it were law. In reply to this monstrous demand, I desire to quote the language of Chief Justice Marshall. In Marbury v. Madison, that great Judge discussed the nature of our government, and especially the duties of the courts in administering the constitutional law in cases like the present. Answering an appeal very much like that of the appellees in this case, Chief Justice Marshall used this language:

"That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it be, nor ought it to be, frequently repeated. The principles, therefore, so established, are deemed fundamental, and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

"The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed

by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislation repugnant to it; or that the legislature may alter the Constitution by an ordinary act.

"Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature is pleased to alter it.

"If the former part of the aternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

"Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature repugnant to the Constitution is void.

"This theory is evidently attached to a written Constitution, and is, consequently, to be considered by this Court as one of the fundamental principles of our society. It is not therefore to be lost sight of.

"If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it were a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on." (1 Cranch, 137, 175-6.)

These remarks of our great Chief Justice and expounder of the Constitution form an appropriate conclusion for this branch of my argument.

III. THE ACT OF FEBRUARY 12, 1901, RELATING TO THE BALTIMORE AND OHIO RAILROAD.

The third and fourth paragraphs of section 8 of the Act of February 12, 1901, relating to this company, are as follows:

"In consideration of the surrender by the Baltimore and Ohio Railroad Company, under the requirements of this Act, of its rights under the several Acts of Congress heretofore passed, and under its several contracts with the municipal authorities of the city of Washington authorized by said Acts of Congress, and in consideration of the large expenditures required for the construction of the new terminals, viaduct, and connecting railroads, as required by this Act, to avoid all grade crossings of streets and avenues within the city of Washington, and, further, in consideration of the grant and conveyance to the United States of the lands included within the limits of the roadway and right of way of the Washington Branch Railroad, which can be used for a street or avenue for the public benefit, the sum of one million five hundred thousand dollars, to be paid to said railroad company toward the cost of the construction of said elevated terminals, viaduct, and structures within the city of Washington, shall be and is hereby appropriated, one half to be paid out of any money in the Treasury of the United States not otherwise appropriated, the other half to be paid out of the revenues of the District of Columbia. The sum so appropriated shall be paid upon presentation of a certificate by the Commissioners of the District of Columbia that the said viaduct has been completed as required by this Act.

"In order to provide for the one half of said amount chargeable to the District of Columbia, the Commissioners

thereof shall, on the first day of July following the passage of this Act, and annually thereafter, pay over to the Treasurer of the United States, out of the revenues of the District of Columbia, the sum of one hundred and fifty thousand dollars, to be invested by the said Treasurer in interest-bearing bonds of the United States or the District of Columbia, until the full sum of seven hundred and fifty thousand dollars, as provided herein, shall have been paid."

These two paragraphs, considered together, may well be described in the language of Chief Justice Bartol in his opinion in the case of Baltimore v. Gill, 31 Md. 375, 387-388, respecting an ordinance of the Mayor and City Council of Baltimore; for, indeed, these paragraphs are, mutatis mutandis, the same as those of the Baltimore ordinance.

That ordinance provided, as this act does, first, for raising money by forbidden methods, and secondly, for "investing" that money in bonds as a subterfuge, or feint, to delude the tax-payers intended to be robbed by it. It was entitled "An Ordinance to provide for raising the sum of one million dollars by the Mayor and City Council of Baltimore, by means of the hypothecation of such number of shares of the capital stock of the Baltimore and Ohio Railroad Company, owned by the Mayor and City Council of Baltimore, as may be necessary for that purpose; and for the investment of the said sum of money in the bonds of the Wsetern Maryland Railroad Company."

This scheme was evidently the chrysalis from which the two paragraphs of section 8, above quoted, sprang into life. Now, as to the first clause of that ordinance, it was clearly shown that it was a contract which, if carried into execution, would create a debt that would result in an increase of taxation on the property of private citizens in Baltimore, though that design was studiously cloaked under the words "hypothecation," etc., just as in this case a similar design is cloaked under the ambiguous word "revenue;" and, as to the second clause, it was shown that the real purpose was not, in good

faith, to borrow money for "investment," but to borrow money to be expended in the construction of the Western Maryland Railroad, and to lend the credit of the city to that company for that purpose. Now, the parties and the immediate subject being changed to suit the occasion, it was the same arrangement, or "adjustment," that we have here. And, again, in that case, as in this, the essential formalities required by the Constitution had not been complied with. In that case the ordinance had not been submitted to a vote of the people and approved by them, as the Constitution of Maryland required in such cases; and here, the bill did not originate with the people's representatives, as the Federal Constitution requires.

Now, the "hypothecation" of stock does not sound like direct taxation; nor does "investment" sound like bounty to a private corporation; nor does a mere formality look like an insurmountable obstacle to the benevolent designs of a railroad corporation. But things are often what they do not seem to be; and in the case of the Baltimore Ordinance Chief Justice Bartol used language which fits this case exactly. He said:

"We hazard nothing in saying that no one can read the ordinance without being impressed with the conviction that the City Council must have been sensible of the difficulties which the Constitution interposed in the way of such legislation, and that its phraseology was ingeniously chosen for the purpose of avoiding the restrictions imposed by that instrument. But, in considering it, we must not forget that we are dealing with substance, and not with form. It is the thing done, or sought to be accomplished, which must determine the question of the power of the Mayor and City Council to pass the ordinance. This depends upon the true construction, operation, and effect of the whole ordinance, not upon the form or mere phraseology of some of its parts." (31 Md., 387-8.)

As to the investment subterfuge, Chief Justice Bartol said:

"This provision was doubtless adopted for the purpose of avoiding the restriction imposed by the Constitution. We think it altogether ineffectual for that purpose." (p. 390.)

Why man not the same criticism be applied to this scheme? Chief Justice Bartol cited Rodman v. Munson, 13 Barber (N. Y.) 63, and Nicoll v. The People, 3 Selden (N. Y.), 9 to 139, in which a provision similar to the Baltimore ordinance and to the one here involved, was declared void as an attempt to evade a Constitutional restriction. To these New York cases I also refer. And I call special attention, at this point, to what has heretofore been said in this brief respecting the construction to be put upon remedial laws.

From the foregoing examples it plainly appears that taxation otherwise unconstitutional cannot be successfully resorted to by clandestinely yoking it with a so-called contract or investment.

Another authority is found in the opinion of this Court in Loan Association v. Topeka, where it was held that "a statute which authorizes a municipality to contract debts or other obligations payable in money, implies the duty to levy taxes to pay them, unless some other fund, or source of payment, is provided; and that if there is no power in the legislature which passed such a statute to authorize the levy of taxes in aid of the purpose for which the obligation is to be contracted, the statute is void, and so are the bonds or other forms of contract based on the statute." (20 Wall., 655.)

And still another authority is found in this Court's opinion in Wilkes County v. Coler, 180 U. S., 506, 521, where it was declared that unless the mandatory requirements of the organic law are literally complied with in the passage of an act imposing or authorizing taxes, such act is not merely voidable, but void.

The same doctrine is practically and forcibly illustrated also in the Income Tax Cases, which arose under the same

clause of the Federal Constitution, prescribing the mode of laying direct taxes, upon which I rely in this case. Could that provision have been evaded by means of a scheme for investing the proceeds of the unconstitutional tax on incomes arising out of lands, in bonds of the United States, to be redeemed by the United States at the end of five years, with the money arising from that very tax—the same money then to be paid to a railroad company toward the cost of construction of improvements on its own property? Could it have been avoided by means of a contract appropriating the proceeds of that tax to the purchase of the old station building of the Baltimore and Potomac Railroad, or to the extinguishment of the Baltimore and Ohio Company's right to use steam engines to draw its trains in Washington until the year 1910? If not, how can it be avoided in this case by doing precisely those things, and nothing ore? If the Constitution cannot be thus evaded, then this whole medley of so-called grants, aids, franchises, contracts of bargain and sale, investments, sinking funds, confirmations, taxes, and exemptions from taxation—this whole magnificent plan of robbery under the forms of law—is necessarily invalid. For the words, "to be paid to the said railroad company toward the cost of the construction of said elevated terminal, viaduct, and structures * * * out of the revenues of the District of Columbia," taken in connection with the last paragraph of section 8, above quoted, undoubtedly amount to a statute which authorizes a municipal corporation to contract a debt, or obligation, payable in money out of its revenues, and which implies the duty to levy taxes to pay it; because no other fund or source of payment is provided; and there is no power in Congress, the legislature which passed the statute, to authorize the levy of direct taxes in aid of the purpose for which the obligations are contracted, either in the mode adopted in originating and passing the statute, or in that pursued in apportioning the direct taxes authorized and required to be laid thereby.

Next, let us glance at section 9 of this Baltimore and Ohio Act of 1901. It is a coin out of the same nugget and the same mould as section 14 of its twin Act of the same date, and is subject to the same criticism:

"Sec. 9. That the property occupied by the Baltimore and Ohio Railroad Company, or by the proposed terminal company, under authority of this Act, together with the improvements which may be put thereon, shall be subject to tax by the District of Columbia the same as other property in the District of Columbia: Provided, that no assessment, valuation, or tax shall be made or levied on the railroad or terminals located, constructed, or maintained under the authority of this Act in excess of that which would or could be lawfully made, laid, or levied if such railroad and terminals were so located, constructed, and maintained without the use of bridges, viaducts, retaining walls, and other structures necessary or properly employed to elevate the same as required by this Act, it being the true intent and meaning hereof that the railroad and terminals hereby authorized shall be assessed and valued for purposes of taxation and taxed on the same basis as if the same were not constructed and maintained by means of such bridges, viaducts, retaining walls, and other structures."

IV. THOSE PORTIONS OF THE ACT OF FEBRUARY 28, 1903, WHICH RELATE TO THE BALTIMORE AND OHIO RAILROAD.

I have already quoted section 6 of this Act, and since that section applies to the Baltimore and Ohio Company as well as to the other, I shall only call attention here to what was said about it when speaking of the same section in its relation to the other company.

Section 8 of this Act contains the following provision:

"The construction of said passenger station and terminal and viaduct by said terminal company, in accordance with the

provisions of this Act, shall be deemed and taken to be a full compliance by the Baltimore and Ohio Raiyroad Company with the requirements in that regard of the said Act relating to it, approved February twelfth, nineteen hundred and one, and the respective periods of five and six years from the passage of said Act, as mentioned in section eight thereof, are hereby extended rspectively for five and six years from the passage of this Act. Except as modified by this Act, all the provisions of said Act relating to the Baltimore and Ohio Railroad Company, approved February twelfth, nineteen hundred and one, shall be and remain in full force and effect."

This provision re-enacts section 8 of the Act of 1901, and is therefore liable to the same objections. I need not repeat those objections here, but will conclude this long argument by saying that in order to establish the contention of the defendants and justify the decrees of the lower courts in this case, it is indispensable that the seven propositions following should be demonstrated fully:

1st. That no portion of the money required "to be paid out of the revenues of the District of Columbia" is to be the result of future taxation in pursuance of this legislation.

2d. That no portion of such revenue is to be the result of "direct taxes," to be levied and assessed, collected and paid over, in pursuance of it.

3d. That no portion of the five annual deposits of one hundred and fifty htousand dollars each, which the Commissioners of the District are required by section 8 of the Baltimore and Ohio Act of 1901, and sec. 8 of the Act of 1903, to "pay over to the Treasurer of the United States out of the revenues of the District of Columbia," in order to form a sinking fund, must or may be the result of taxes directly imposed by, or authorized to be imposed under this legislation.

4th. That no portion of the revenues of the District of Columbia can, within five years from the first day of July, 1903, accrue from taxes on the property of the railroad companies.

5th. That the exemption of the improvements on land from taxation, provided for, is not a discrimination in the matter of taxation which could be made only in a bill for raising revenue.

6th. That the Acts aforesaid, originated in the House of Representatives.

7th. That the apportionment of taxation by said Acts is not arbitrary or capricious, but strictly in conformity with section 2 of article 1 of the Constitution.

No attempt has been made, or can successfully be made, to demonstrate any one of these propositions.

In lieu of such demonstration, however, appeals have been made to the courts to disregard the Constitutional restrictions upon the power of Congress to lay taxes. "Let us hear no more of confidence in man, but bind him down from mischief by the chains of the Constitution."

JOSIAH MILLARD.